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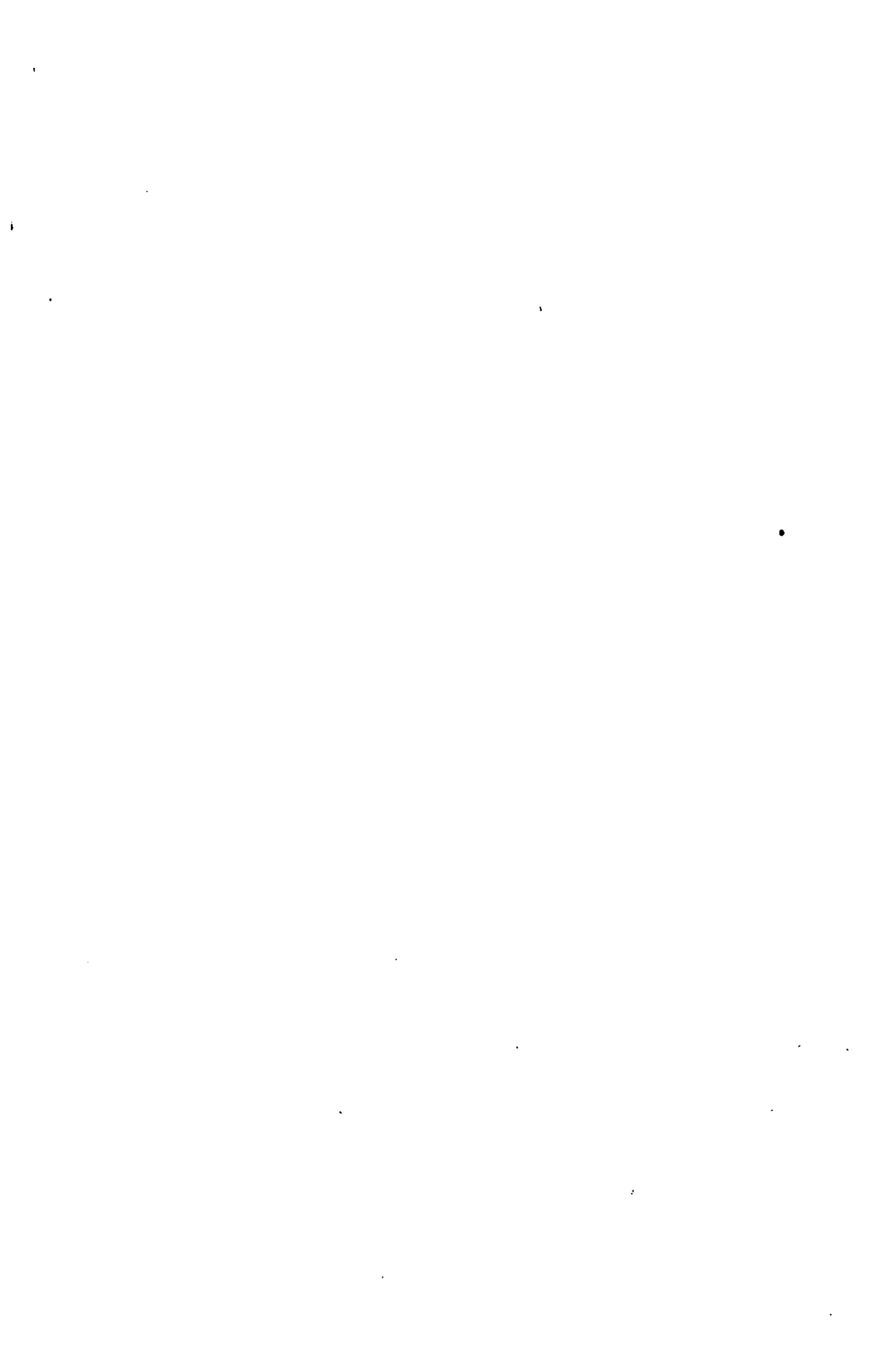
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1893

THE
LAW QUARTERLY
REVIEW.

EDITED BY
SIR FREDERICK POLLOCK, BART., M.A., LL.D.
CORPUS PROFESSOR OF JURISPRUDENCE IN THE UNIVERSITY OF OXFORD.

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NOTES.

THE sudden and lamented death of Mr. W. E. Hall has diminished the small number of English lawyers who have been qualified to discuss international matters with their Continental colleagues on equal terms of training and information as well as ability. Mr. Hall's book on International Law took its place at once as the best text-book of the subject yet produced in this country, and his recent work on Foreign Jurisdiction broke new ground in a region where skilled exploration was much wanted. His method was exact without pedantry and English without insularity. Not the least praise of his writings is that they are wholly free from the patriotic bias which too often disfigures the reasoning and the conclusions of publicists. Neither partisanship for his own country nor the fear of being thought a partisan ever prevented Mr. Hall from doing his best to form an impartial judgment on accurately ascertained facts. A fuller notice of his work will appear in the next number. F. P.

In the article on 'Some Points of Difference between English and Scottish Law,' which appeared in the REVIEW for October, there was an inaccuracy which it may be well to correct. It was stated that in Scotland, in the case of a person who could not write, a deed had to be executed by two notaries before four witnesses. This was the old law. An alteration was made by the Conveyancing (Scotland) Act of 1874. Section 41 of this statute enacted that execution by a single notary or Justice of the Peace before two witnesses should be sufficient. J. A. LOVAT-FRASER.

Next month the Editor of this REVIEW will enter upon the office of Editor of the Law Reports. He cannot be expected to criticize in public the work for which he is himself answerable to the profession. But any criticism or suggestion which our learned readers may think proper to send to him will be considered, and he will be

glad to publish or notice in this REVIEW (of course as coming from correspondents) those which appear of sufficient importance.

In our last number we accidentally omitted to mention the name of Mr. Charles Elton, Q.C. among the contributors to whom we have been indebted, and we now request our readers to consider his name inserted among the 'representatives of special branches of learning and applied legal science' to whom we expressed our thanks (vol. x. p. 289). Another apology is due from the Editor to Mr. Justice Holmes. The phrase 'the Common Law abhors a vacuum of property' (vol. x. p. 320) is almost identical with the language of Holmes on the Common Law, at p. 237. The reminiscence was quite unconscious at the time. A more specific authority than either Mr. Justice Holmes or the Editor adduced may be found in Doctor and Student, Dial. ii. c. 51: 'The law must needs reduce the properties of all goods to some man.' Note, reader, that the case of *Arrow Shipping Co. v. Tyne Commissioners*, in which this question is touched upon, as we mentioned in vol. x. p. 293, is now reported in the Law Reports, '94, A. C. 508. In this case the ship had been abandoned to underwriters.

Why are we receiving no more Year Books from Mr. Pike? The Introduction to his last volume was dated in August, 1891, and his previous exploits had led us to hope that we were to have at least one volume a year. We must ask him to remember that he is uniquely competent to carry on the work that he has admirably begun. He must forgive us if we say that even his interesting book on the House of Lords will not excuse him in the eyes of posterity if he abandons the important task on which he entered. The series in which his volumes have appeared is published 'under the direction of the Master of the Rolls.' We hope that the Master of the Rolls will forthwith direct that the publication of the Year Books shall go forward with all convenient speed, and shall not be suspended, at all events so long as there are any reports of the fourteenth century that have never been printed.

The decision of the Court of Appeal in the *Maxim Nordenfelt Company's* case is affirmed by the House of Lords, '94, A. C. 535, and in such a way as to broaden and simplify the principles of the law. Lord Herschell and Lord Macnaghten agree in justifying, substantially if not verbally, the revolt of Sir Edward Fry, now fourteen years ago, against the supposed rule that an agreement in restraint of trade could be valid only if expressly limited in space. The rule, while it existed, was not a substantive rule of law, but only a primary test—for the most part a sufficient one before the

modern improvement of communications—whether the restriction exceeded what could be reasonably required for the covenantee's protection. Lord Macnaghten's masterly opinion is especially deserving of most careful study. It is good to see that the Common Law is still capable of development even on familiar ground.

Sirdar Gurdial Singh v. Rajah of Faridkote, '94, A. C. 670, is a curious and interesting case as showing to what extent even the minor Native States of India retain their individuality in matters of internal justice and jurisdiction. Probably ninety-nine readers of the Law Reports out of a hundred have never heard of either Faridkote or Jhind. But the jurisdictions of these two States are as distinct as those of New York and California, and a Faridkote judgment is a foreign judgment in Jhind and every other part of India outside Faridkote, whether British or native territory. The principle enforced in the case is a fundamental one, namely, that all jurisdiction is properly territorial, and claims of a local court to extra-territorial jurisdiction which are not established by treaty, voluntary submission, or other good special cause, will not be regarded by any foreign court. The fact of the cause of action having arisen within the jurisdiction and at a time when the defendant was subject to it is not of itself sufficient cause for this purpose.

The important copyright cases of *Hanfstaengl v. Empire Palace*, *Hanfstaengl v. Newnes*, of which the first was noted in our October number (p. 295) from 'The Reports,' are now reported in the Law Reports, '94, 3 Ch. 109. The decision of the C. A. was affirmed in H. L. Dec. 17, 1894. In another branch of that subject, sect. 18 of the Copyright Act of 1842—the worst drawn section of a singularly ill-drawn Act—has been a little more cleared up: *Johnson v. Newnes*, '94, 3 Ch. 663. Romer J. decided, in substance, that separate and distinct works do not lose their individuality or their claim to separate protection by being published in the same volume or number, or under one more general title.

'In the absence of authority, my Lord,' said an eminent Q.C. the other day, 'we are reduced to look at the case on the low ground of principle.' The irony was not so great after all. An English lawyer feels helpless without a case, and as a consequence we are case-ridden. Take that small corner of the law field—directors' qualification—it is become a perfect quagmire, and fresh cases serve only to make it worse. Said Vaughan Williams J. in a recent case (*In re The Issue Co.*, not yet reported), in which he was being plied by counsel on both sides with qualification cases, 'Mr. X., cannot we put the cases aside for a moment, and argue this

case on principle?' And lo! light out of darkness. The fallacy which has perplexed this matter so much is that of confusing an agreement to qualify with an agreement to become a member of the company within section 23 of the Companies Act, 1862—two different things. In *re Bolton & Co., Salisbury-Jones and Dale's case*, '94, 3 Ch. 356, 7 R. Nov. 171, C. A.—another qualification case—was a very pretty puzzle, as we may guess when Lindley L.J. dissents from the Lord Chancellor and Lord Davey on a point of company law. Let us hope the new company law reform Commission will put this qualification question on a rational and permanent basis.

The decision of the Court of Appeal in *Warren v. Murray*, '94, 2 Q. B. 648, 9 R. Dec. 318, settles that the proviso to section 7 of the Real Property Limitation Act is not confined to express trusts. This follows and approves *Drummond v. Sant*, L. R. 6 Q. B. 763, a case doubted by some real property lawyers (see Lightwood on Possession of Land, 220, 221), although it was decided by a strong and unanimous Court (Blackburn, Lush, and Hannen JJ.). The point of substance is that possession rightfully entered upon, and continuously justifiable under an equitable title, must now be referred by every branch of the Court to that title, and not treated as a possession adverse to the legal estate. An occupier under an agreement which entitles him to a lease at a peppercorn rent is a tenant at will so far as regards his interest at common law, but in equity he is a virtual leaseholder entitled at any moment to specific performance of the agreement, and there is no question of the Statute of Limitations running against the freeholder before the expiration of the term contracted for.

Re Harding, '94, Ch. 315, 7 R. Oct. 64, C. A., is a case of some importance to conveyancers. It exhibits the defeat of an ingenious and persistent attempt to narrow the construction of a power in a marriage settlement, in fact to persuade the Court to reverse the ordinary principle *ut res magis valeat quam pereat*. Observe that the law stands blameless for this kind of litigation. Four judges, three of them equity lawyers of special eminence, held that there was no real doubt. Neither Parliament nor the judges could, without danger of real oppression, deprive obstinate parties of the right to argue out untenable points. The full reporting of such a case is perhaps useful as a warning against such adventures rather than for any real addition it can make to legal knowledge.

The Court of Appeal has made it clear, by the judgments of both its divisions (*Hood Barrs v. Cathcart*, '94, 2 Q. B. 559, 9 R. Sept. 199, 9 R. Dec. 327, *Re Lumley*, '94, 3 Ch. 135), that the Married Women's

Property Act was intended to preserve, and did preserve to the fullest extent, the peculiar and quasi-sacred character given by the doctrines of equity to separate estate which is subject to a restraint on anticipation. Every possible device has been tried to make the Act an instrument for circumventing this restraint, and has been tried in vain. It may be thought by some that married women have now acquired the powers of a *feme sole* without the responsibility. Such persons may console themselves by observing that a married woman's common law liability for her ante-nuptial debts is not affected, as appears by *Robinson, King & Co. v. Lynes*, '94, 2 Q. B. 577.

Sir George Jessel once wished there was some forensic term for impudence, and the wish keeps recurring to us in reading some of the infant cases which are seldom absent from the reports. In most cases where it is a question of shares, the unconscionable infant is glad enough to get off the list of contributories. In *Hamilton v. Vaughan-Sherrin Electrical Engineering Co.* '94, 3 Ch. 589, 8 R. Dec. 228, she—it was a lady of course—wanted her money back as well. The test of her right is given in *Corpe v. Overton* (10 Bing. 252) and *Holmes v. Blogg* (8 Taunt. 508), viz. whether the infant has derived any advantage under the contract. The young lady speculator of eighteen in question had received no dividend, but her name had been on the register of the Company for six weeks. The Court failed however to discover any advantage in that. To figure on the register of a Company in imminent hazard of being wound up is indeed one of those advantages which persons have been known to pay handsomely to be rid of. *Hamilton v. Vaughan-Sherrin Electrical Engineering Co.* is good law, but sadly encouraging to the 'new woman'—until she comes of age.

An arbitrator may be a judge in his own cause, or in a matter in which he has obvious grounds of personal interest, if the parties to the reference have deliberately thought fit to make him so: *Eckersley v. Mersey Docks and Harbour Board*, '94, 2 Q. B. 667, 9 R. Dec. 342, C. A. The appellants were rewarded for their persistence by getting the unanimous opinion of six judges against them.

Mary Howitt in her charming autobiography informs us that while in Germany she observed a nail two inches in length projecting from the plank by which intending passengers passed from the shore to the boat. One after another stumbled against the nail and injured themselves or their garments, until at length there came a man who ordered the nail to be driven into the board. 'Sir! forgive my freedom,' said a man who stood by, 'but that simple

fact shows me that you are an Englishman.' It is quite true. This intolerance of abuses is certainly an English trait. But public spirit may be carried too far, even when you are fighting such an excellent cause as free water for the fixed domestic bath. In *A.-G. v. Vestry of Camberwell* (8 R. Nov. 227) it amounted to something like a conspiracy to defeat the law, a vestry plan of campaign. These Companions of the Bath seem to have thought that they might set the law at nought because they meditated an appeal. They seem to have been unaware that even a judge of first instance can settle the law. Or is it that familiarity with the law's kaleidoscopic changes has made the law 'disrespeckit,' as the Scots would say.

'Fancy word or words' having proved far too nebulous as a kind of trade-mark, the Legislature has in its wisdom substituted an 'invented word or words.' The theory of both these enactments is that you must not monopolize any word which is common property—current coin, but you may 'ascend the heaven of invention' and coin one for yourself, if you can. The difficulty is in saying whether there is any invention or not, just as in saying whether there is novelty in a patent. In *re Sir T. Salt's Trade Mark*, '94, 3 Ch. 166, and *In re Farbenfabriken Vormals* (7 R. Oct. 89, '94, 1 Ch. 645) are instructive on this point. 'Eboline' for instance—as the former case shows—will not do because Eboli is a town in Italy, and the addition of 'ne' does not constitute invention: nor will 'Somatose'—the subject of the latter case—because there again it is only the addition of 'e' to the Greek word σώματος (*diss.* Lindley L.J.). In other words, it is not enough to give a word 'a new hat and stick,' as Sir Walter Scott would say. But what with the extensiveness of modern vocabularies and the avoidance of anything descriptive, the invention of a good catchword demands nothing short of genius.

Lawyers have been charged before now with laying heavy burdens and grievous to be borne on men's shoulders, and they would have amply sustained their reputation in this way if the Court in *Wigram v. Buckley* (7 R. Nov. 136) had extended the doctrine of constructive notice of *lis pendens* to choses in action or chattels. This doctrine is part of our fast decaying real property system; it belongs to the palmy days of conveyancing, where a 60 years' title had to be investigated, and people had plenty of leisure to do it, and to hunt for *lites pendentes*. In our present hansom cab and telephone era of business, when choses in action, too, constitute a principal species of property, to extend this antiquated doctrine of *lis pendens* to all property would be simply disastrous—it would

paralyse business. Imagine, as Lord Davey says, the effect on the Stock Exchange transactions, where you do not know even who you are buying from. *Wigram v. Buckley* is another instance of the wisdom with which modern judges are moulding the law to meet the requirements of business. We have left behind us the days when man was considered to be made only for the law.

Debentures have been very much cried out upon of late—floating debentures, that is to say, charging a company's undertaking and all its property present and future. No sooner—it is urged—does the company get into financial difficulties and become a wreck than the piratical debenture-holders swoop down and scuttle the ship, leaving nothing for the unhappy unsecured creditors (*Davies v. Bolton & Co.*, '94, 3 Ch. 678, 8 R. Nov. 277). This of course is unsatisfactory, but then insolvency always is unsatisfactory, and from time immemorial the mortgagee—personified by the stage attorney—has been an object of odium. Debentures really are sometimes paid for in cash, or if not in cash, in meal or malt, and as such the *quid pro quo*, whatever it is, goes to swell the assets. The scandal is where a vendor, who has sold his property or business for an extravagant price to a company which he has promoted, is paid in debentures, and on winding up resumes his property, leaving the creditors of the company unpaid. Liquidation by debenture-holders has its disadvantages: for in such a case the debenture-holders with the frankest cynicism decline to let their property be spent on misfeasance proceedings. Thus justice is baulked.

Kant's criterion of social conduct was, 'Ask yourself what would be the result if everybody did the same:' for example, left a wheelbarrow standing in the road (*Thorpe v. Brumfitt*, L. R. 8 Ch. 656). The defendant in *Lambton v. Mellish*, '94, 3 Ch. 163, 8 R. Dec. 285, 43 W. R. 5, would fain have ignored this salutary rule of conduct. He kept his steam roundabout going night and day with organ accompaniment, and never asked himself the Kantian question what would be the effect if other steam roundabouts and organs were kept going in the same way night and day. The effect, in fact, on the plaintiff—hemmed in between the two—was, as might be expected, 'maddening.' It is satisfactory to find that Chitty J.'s exposition of the law is quite in harmony with the formula of the German philosopher, in other words, that where acts collectively constitute a nuisance each contributor is liable, though what he does taken alone would not amount to a nuisance.

Nuisances, it is evident from the cases, are a growing topic in our overcrowded civilization—noises especially. Lord Ellenborough on

a celebrated occasion ordered the tipstaff to bring 'the 46th Queen's Westminster Volunteers before him,' when the said Queen's Westminsterers were noisily tramping outside in Westminster Hall to the disturbance of the course of justice. The law, like Nasmyth's steam hammer, can crush a ton of steel or crack a nut. It can commit a Corps or it can suppress, as it did in *Innes v. Newman* (63 L. J. M. C. 198, 10 R. Sept. 269), an urchin who insists on crying newspapers for six minutes consecutively under the windows of a harmless citizen. This conviction is good news. True, it was under a borough by-law against making 'any violent outcry, noise, or disturbance in the streets, &c., to the annoyance of the inhabitants,' but saith not the common law the same thing also? 'Experimentum fiat.' News of 'The Winner' now invades even the peaceful precincts of Lincoln's Inn, and is bawled beneath the very shadow of the Temple of Justice itself. Charles Lamb tells us that when he got a letter, or a visitor called, his writing was over for the day. Leech was the same. These may be

'The souls by nature pitched too high.'

But it is a neurotic age, and nerves must really obtain more recognition.

Even when they are the nerves of a horse. For we have yet another case of nuisance in *Jeffrey v. St. Pancras Vestry* (63 L. J. Q. B. 618, 10 R. Dec. 457). Ruskin, if we remember right, with his usual affluence of vituperation once described a locomotive as 'a howling, shrieking fiend, fit only for Pandemonium.' A steam roller on its travels puffing and blowing off steam yields nothing in this respect to a locomotive, and at such an apparition even a quiet well-disposed horse may be pardoned for bolting. At all events that is what the plaintiff's horse in *Jeffrey v. St. Pancras Vestry* did, and Charles and Collins JJ. had no difficulty in supporting the verdict of the jury finding the roller a nuisance, though the jury negatived any negligence in the management. You may paint your carriage, as Collins J. pointed out, green, brown, or any ordinary colour, but if you construct and paint it of startling hideousness, you must be prepared to pay damages if it upsets a horse's nerves. This must have been a perverse roller. For it is common experience that for many years horses, London horses at any rate, have treated ordinary well behaved steam rollers with perfect indifference.

It is not until some fragment of old law comes tumbling down that we note how it has been silently sapped by a current of judicial decisions. The reflection is suggested by *In re Brooke, Brooke v. Brooke* '94, 2 Ch. 600, 8 R. Sept. 103, and another

unreported case before Vaughan Williams J. (*In re Milard*) on executors carrying on their testator's business. The old law was that the new creditors looked to the executor alone for payment;—so I always understood the law, said Vaughan Williams J. Then came the case of a testator dedicating part of his estate to carry on his business, and with it the view that the creditors were entitled to be surrogated to the executor's right of indemnity against the appropriated fund (*ex parte Garland*, 10 Ves. 110, 119; 7 R. R. 352), and (by another step) against the whole estate, when the whole estate was embarked. Now Kekewich J. and Vaughan Williams J. have independently reached the conclusion that it does not matter whether the will contains an authority to trade or not, if the business is being properly carried on, i.e. with a view to the realization of the estate. Putting together this and *Dowse v. Gorton*, '91, A. C. 190—that the executor's right is paramount—we get the rather odd result that the new creditors come first on the estate—an entire *bouleversement* of the old position. If the testator's creditors want to escape being charged with acquiescence, they must get the estate administered without delay.

In *re Edwards*, '94, 3 Ch. 644, 8 R. Nov. 218, Kekewich J. considered himself bound to follow an Irish Chancery decision of 1874, cited in Theobald on Wills, but not in Jarman, without any discussion of its merits. This would no doubt have been the correct course as regards an English decision which had become current among conveyancers. But so much deference to a jurisdiction which is not really co-ordinate, or authoritative in this country, seems a little excessive. We are not aware that English conveyancers are to be presumed to guide their judgment on English titles by Irish decisions, which probably very few of them read.

The law is not so cynical as to say 'Treat every man as a possible rogue,' but it frankly recognizes the indeed undeniable fact, that there are a certain proportion of actual rogues in every community, and a still larger proportion of potential rogues—persons that is with whom 'the means to do ill deeds makes ill deeds done,' and with characteristic good sense it says to each man 'You must reckon with this social factor in your dealings, you must not merely not commit fraud yourself, but you must not facilitate fraud.' In drawing a cheque for instance, you must not—as too many are—be guilty of negligence with reference to the form of the instrument (*Young v. Grote*, 4 Bing. 253), for a loosely drawn cheque is an instrument of fraud. Negligence in such a case is of course

a question of fact. The bill in *Scholfield v. Londesborough* ('94, 2 Q. B. 660, 10 R. Sept. 297) came very near the line. The case has been affirmed in the Court of Appeal, Dec. 19.

The persistent endeavours of railway companies to make statutory penal jurisdiction created for the prevention of fraud a terror to persons who have no fraudulent intention has received another wholesome check in *Huffam v. North Staffordshire Ry. Co.* '94, 2 Q. B. 821, 10 R. Dec. 410. A passenger who travels with a return ticket out of date, being under an honest mistake as to its validity, is liable to pay his fare, but not to be fined, and a by-law which purports to make him guilty of an offence and subject to a penalty is bad.

We learn from the *Harvard Law Review* for December that *Fletcher v. Rylands*, L. R. 3 H. L. 330, which has hitherto been followed in Massachusetts, is thought to be more or less shaken by a decision of the Supreme Court of that Commonwealth. We do not well understand from the statement how *Fletcher v. Rylands* was involved, for the cause of action was the fall of a mill chimney under the stress of a heavy but not unusual gale. It has never been maintained, to our knowledge, that a man builds a chimney at his peril. This case would seem rather to be of the class where the burden of proof is thrown on the defendant because a thing under his control has done damage in a manner of which defective construction or repair is the most obvious explanation (*res ipsa loquitur*). An ordinary gale does not, as a rule, blow down a properly built chimney. See *Scott v. London Dock Co.*, 3 H. & C. 596, *Mullen v. St. John*, 57 N. Y. 567.

Our contemporary *The Green Bag*, of Boston, Mass., has published a highly flattering paragraph on Sir F. Pollock's book on the law of Torts. Unluckily there is *amari aliquid* withal, for the learned and friendly American writer had been reading the book in a pirated edition. English authors perhaps take a narrow and insular view, but they really do not like being pirated.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

SPECIALISM IN LAW¹.

I HAVE chosen 'Specialism in Law' as the subject on which to say a few words to you this evening, because a desire to simplify and to concentrate has been the distinguishing feature of the legal period in which we have been living, and I think that the time has now come when the value of the endeavours to obtain greater uniformity in law, and in practice, can be estimated. The well-considered effort to fuse English law, and bring together English lawyers, made simultaneously with, and perhaps occasioned by, our establishment in a common home at the Law Courts, was an important event in our legal history. Its importance, indeed, should not be exaggerated. It cannot, for example, for a moment be compared, in respect of either the difficulty of the task or the success in its accomplishment, to the legal revolution effected by Napoleon in France. It is not easy to imagine a similar blending of discordant elements, or a similar reconstitution of a legal system, in this country. Happily, the conditions for such an operation do not exist. The various provincial customs of France before the Code Napoleon exceeded in number what may be called the provincial differences of law in our country. We may be thankful that neither Ireland nor Wales have for centuries possessed legal systems different from that of England. But picture to yourselves for a moment an attempt to fuse the law of England and of Scotland. I do not profess to say how we in England should like to receive a reformation of our law from the north, because I admit that my chief knowledge of Scotch civil law is derived from the pages of Guy Mannering and Redgauntlet, and of Scotch criminal law from the pages of The Heart of Midlothian. I think, however, that if, for example, the Scotch laws of celebration and dissolution of marriages, of legitimation of ante-nuptial children, or even the general admissibility in evidence of the statements of deceased persons, were proposed for our imitation, we should repeat *Nolumus leges Angliæ mutari*. I doubt, too, if the language of Scotch legal instruments would ever commend itself, either to our hearts or our lips. But I can guess how a scheme for the remodelling of Scotch law on English principles would be received in Scotland.

¹ An Inaugural Address, delivered by the Right Honourable Sir Francis Henry Jeune, President of the Probate, Divorce, and Admiralty Division of the High Court of Justice, as President of the Birmingham Law Students' Society, in proposing Prosperity to the Society, at the annual meeting of the Society held on Saturday, March 17, 1894.

The attempt to introduce episcopacy would be nothing to it. The *perfidum ingenium* of our fellow-countrymen would be up in arms. We have been lately compelled to beat a rather hasty retreat from the proposal to enact a considerable number of rules, of which a small portion encroached, or was thought to encroach, on the rights of Scotch domicile. I do not think that any English Prime Minister (whenever there be one) would be likely to provoke a conflict which would inevitably bring out a legal Wallace, and would more probably reproduce Bannockburn than Flodden. Nor do I believe that an attempt to absorb even the little legal satellites of the Isle of Man, and the Channel Islands, could be made without eliciting utterances far from the harmony of the spheres. I am afraid that in my capacity of Judge Advocate General, I have recently raised a legal storm in the Isle of Man by an attempt to take a militiaman, absent without leave, before a magistrate, under the provisions of Acts of Parliament, the extension of which to the Isle of Man is denied; but I entirely sympathize with the Manxmen, because, as a Jerseyman, I confess I think that an invasion of the privileges of that island would justify an invocation of Rollo on the grandest scale. Yet I imagine that the difficulties which Napoleon had to encounter were not less than these. But his success was complete. The various and discordant laws of France were replaced by a Code embracing all the branches of the law. That Code was accepted, and to this day it controls the affairs of Frenchmen in a way in which we find it difficult to believe that any fixed code can. It has done more. It has gone to our French fellow-subjects on the other side of the Atlantic. It has formed the basis of the law of the sister Latin race in the Italian peninsula. It has recently been transplanted to Egypt. Our legal reformation of 1873 fell far short of the political reformations of our history. The French legal reformation was a fitting counterpart to the political transformation which had taken place. In truth, it never could have been accomplished except by a man of genius in a period of revolution.

But, puny in comparison as our efforts after unity may appear, it does not follow that the difficulties were not considerable, nor that the more limited attempt was not a wise recognition of the needs of the time.

The peculiarity of the legal position in England has always been that several systems of law have prevailed at once, and over the same area. The jurisprudence of Rome presented a somewhat similar phenomenon; but it has not reappeared in any other society to the same extent as in our own. Different systems in different parts of a country under one government have, of course,

been common. In the United Kingdom, besides the Scotch and other bodies of law controlling smaller populations, but complete in themselves, of which I have spoken, customs—which, in fact, are special laws—have always existed in the City of London, in the homes of gavelkind and borough English, and in a vast variety of manors. But, at the same time, all over England there prevailed the common law, there prevailed equity, and there prevailed also that third system, born of the canon and civil law, according to which the jurisdiction of the Church and the jurisdiction of the Lord High Admiral were exercised. These different systems, though having much in common, chiefly because worked by Englishmen of the same training, and in a similar spirit, had also broad distinctions—

‘*Facies non omnibus una,
Nec diversa tamen, qualem decet esse sororum.*’

But they were different systems, yet applicable to the same community, at the same time and in the same place.

It must be admitted that these systems have not always formed a happy family. It is, indeed, a remarkable instance, not only of the habits of thought, but of the practical good sense of English lawyers, that from the struggle which took place nearly three hundred years ago, equity was permitted to emerge the victor, and take its place beside the common law. It is not easy for us to understand why, when the common law was admittedly inadequate, and even in some cases unjust, its powers and duties were not reformed by statute, rather than a jurisdiction developed to modify old and create new remedies, under the protecting artillery of injunctions. But to improve legal remedies by Act of Parliament has never been popular in England; and though the storm that raged between Lord Coke and Lord Ellesmere rumbled on for about half a century, common law and equity, thereafter, peacefully agreed to differ. The contest between the common law and the tribunals which claimed to administer the law ecclesiastical and the law of the seas was sharper and more lasting. Prohibitions were a less rusty weapon than *praemunire*. In the battle which Lord Coke waged against Archbishop Bancroft and the Lord High Admiral, the royal interposition was invoked with a result more satisfactory to the common law. Recently, but only recently, the tide has seemed to turn. In the contest a few years ago between the Lord Chief Justice of England and the Dean of the Arches over a prohibition, which recalled the controversy and almost the language of the time of Elizabeth, with the characteristic difference that the rivals appealed to the public and not to the Crown, it cannot be said that the representative of the civil law was worsted. Modern

legislation has increased the powers of the Court of Admiralty and the Court of Divorce; and it is only a few months ago that the House of Lords admitted in the Court of Admiralty powers which the statute of Richard II was invoked to negative.

But I believe that, beneath these disputes of mighty names, and apparently profound issues, a humble but practical question was involved. What was, in truth, at stake was not the victory of one or other rival systems of law, but the distribution of business. The duty of any judge who did his duty, *ampliare jurisdictionem*, when fees and jurisdiction went together, was, of course, clear. The border warfare, therefore, between the rival provinces of law was naturally keen. But it was not permitted to be carried to the extinction or absorption of any one of the competitors, because the practical sense of Englishmen told them that special tribunals deal best with special subjects. The real effect of the profession of different principles of law by different Courts was to distinguish and appropriate different classes of business. To say that equity recognizes trusts, and the right to specific performance, was to assign cases involving these subjects to the Court of Chancery. To refuse to acknowledge the virtues of venue was to bring cases on the high seas into the Admiral's Court; to allow fictitious venue was to retain some portion of foreign jurisdiction for the Courts at Westminster. To deal with marriage otherwise than as a civil contract was to assign divorce to the ecclesiastical judges. It has, indeed, been claimed that the distinction of Courts rises to the rank of a principle. 'Omnino,' said Lord Bacon, '*placet curiarum separatio. Neque enim servabitur distinctio casuum, si fiat commixtio jurisdictionum; sed arbitrium legem tandem trahet.*' It is perhaps true that an imperfectly informed tribunal is apt to fall back on the light of nature that is in it, and call the process deciding according to common sense. But we may be content with the belief that for practical reasons the separation of Courts has ever commended itself to the minds of Englishmen.

It is obvious, however, that such separation of Courts might in some cases lead to hardship. If a man's adviser knew into which category his client's case fell, and the whole of it did so fall, all went well. But sometimes he did not; sometimes the case involved more than one class of subjects; sometimes in its course it developed fresh aspects. It was not pleasant to hear that under such circumstances the suit must be recommenced. Of course the client was told that the wisdom of the law required his sacrifice, but probably in few instances was his spirit sufficiently chastened to appreciate the consolation.

It has always seemed to me that those who devised the legisla-

tion inaugurated by the Act of 1873 had in view, with singular clearness, the essential merits and demerits of the system which they were remodelling; and also that, where they went beyond the remedies for which those defects called, time, and the silent action of practical experience have led, and are leading us, back to the right path.

The combination of all the high tribunals of the kingdom, the union of what I have called the sisters of common law, equity, and civil law, together with their statutory relative the Court of Bankruptcy, into one Supreme Court of Judicature, effected by a single section, was striking in form and effective in operation. It was intended to remove once for all, and it did remove, the scandal of the suitor hunted from Court to Court. It is possible that in some cases permission to reconstruct his proceedings, on the terms of payment of costs, left him, if he only knew it, much where he was before. But in many instances substantial injustice was averted, and in all a right principle was affirmed. There are, however, two things in the Act of 1873 which seem to me to show how true it is that a distinction of legal systems was in truth only a division of legal subjects. The first of these is the extreme smallness of the change which was really made in the law of each set of Courts. It was, indeed, provided both by reference to some special points, and in what looks like a far-reaching section, that, when equity and common law conflict, equity should prevail. But has this provision been so potent? Long before it, equitable pleas were allowed, about which, if I may recall my pleading days, the chief conviction in the minds of common lawyers was that they were not law¹; and, since 1873, I have seldom heard of the authorities of the Queen's Bench Division concerning themselves with recondite doctrines of equity, except to disclaim acquaintance with them. Beyond this introduction of equity into the Courts of common law, which has come to so little, what was there? Practically nothing, I think, except the introduction into the common law of the Admiralty rule as to damages in cases of collision between ships—a provision of interest, because it recalls the candour with which Lord Selborne permitted his strong opinion to be changed by discussion, but not very important, as the Queen's Bench Division seldom tries collisions between ships. The second point I desire to notice is that the Act of 1873, in the moment of unifying the law, affirmed the necessity of separation of tribunals. This was called assigning certain special matters to each of the Divisions. It was, in fact, doing formally what English lawyers had always

¹ [My impression is that on the north side of Fleet Street they were not always recognized as equity.—Ed.]

done practically, and performing homage to specialism in the administration of the law.

The limits of the new scheme were not at first perceived, perhaps not even by its authors. I believe the expectation was cherished, by the best informed, that in future every pleading would be identical in form, every case follow the same procedure, and every judge deal with every subject. Some of us remember the jury-box which appeared in the Court of the Master of the Rolls in the glory of new paint and lettering; probably more of us recollect the Judges of the Chancery and Probate Divisions assuming robes of scarlet and exercising the functions of Judges of Assize.

But though the unity created has by no means been wholly theoretical, and, even if it were, would not be without advantages, it is a significant tribute to the utility of former methods that hardly was the new *régime* inaugurated, when the features of the old reappeared. The former landmarks speedily emerged from the subsiding flood. It was said that the process was hastened by practical difficulties which had not been anticipated. It was remarked that the highest exponents of equity despaired of insens-ing common, or even special, jurymen with its choicest doctrines. It was whispered that one eminent Chancery Judge on circuit expressed his astonishment that a wife was not called to prove her husband's innocence; and that another discerned a crucial significance in the sanguinary epithet applied by a prisoner to his jacket. These were, no doubt, the myths of a freakish fancy. But they have outlived the system which they were supposed to illustrate. Equity judges and juries on circuit, and elsewhere, have bidden each other a long farewell. The pleadings of common law and of Chancery, though divested of some of their formalities, retain their distinctive characteristics. Common law chambers, with the Master and the Judge, are much what they were. Chancery chambers still, I understand, enshrine the mysterious union of the Judge and his Chief Clerk. I am not aware of any substantial change that has taken place in the procedure of Probate, Divorce, or Admiralty. In the trial of facts, the common law, though to a less extent, still clings to juries; the Chancery Division still, though to a less extent, welcomes affidavits; and in the Admiralty Division, the Elder Brethren of the Trinity House still sit beside the Judge, and the Registrar and merchants still assess the amounts which his judgments leave for their determination. In short, the various systems have borrowed some things from each other, have even in some things imitated each other; but when we pass by names and look at facts, we find the lines of demarcation almost as clear as they were to the master-minds which drew them.

Perhaps, after this, I need hardly say that in my humble opinion, specialism in the administration of the law is no defect. But I desire to limit myself to little expression of my own opinion, and rather to suggest to your reflections in the course of your reading and practice, whether tribunals, at any rate those concerned with the most important business, do not best perform their functions by a restriction of the classes of subject with which they deal. It should be at once admitted that the general jurisdiction exercised by the County Courts has exhibited the aptitude and versatility both of judges and practitioners in a remarkable degree. There have been few more successful experiments, or it may be revivals, than the establishment, all over the country, of economical and expeditious tribunals, and the extension of their powers to Equity, Bankruptcy, and Admiralty has not detracted from their efficiency. Perhaps, indeed, the time has come when the limits of their common law powers, which have been allowed to remain below those of their other functions, should be raised. But I would suggest to you that there is a distinction to be drawn between Courts dealing in the first instance with the mass of the current business of the country, and those constituted for the discussion of cases of exceptional importance, either from their magnitude or novelty. This should be, and broadly speaking it is, the distinction between the County Court and the Supreme Court. The characteristic function of the one is to administer the law; the characteristic function of the other is to declare, or, it may be, to make it. I do not say that either tribunal always acts up to its character. But what institution or individual does?

I should put the advantage of tribunals being confined to special classes of subjects, mainly, on two grounds—speed and consistency; and we may look for the manifestation of these virtues alike in judges and practitioners. Many of my audience know already, and the remainder will, I am sure, discover, that practitioners and judges are very much what they make each other. It is not apt to lead to satisfactory results when the advocate is much better equipped than the judge. The eventual decision may not be wrong. Well-informed advocates are always considerate, especially if their knowledge is not recent, and often have the gift of exposition. A judge may discreetly hold his tongue, and allow wisdom to linger till knowledge comes. If Lord Campbell had not recommended such a method of enlightenment to Lord Chancellors, I should have hesitated to add that the faces of bystanders may be usefully consulted. But an argument under such circumstances is not edifying: certainly it is not likely to be productive of those phosphorescent hints and observations which sparkle along the path

of an effective discussion, and glimmer into the dark corners left for future litigants to explore. The spectacle of a judge who knows much more than the advocate before him is more impressive ; but I am not sure that the decision is not in greater peril. But when judge and practitioner are both well acquainted with the existing law, and each is keenly observant of the dividing line between tried ground and possible quicksand, then comes a trial worthy to be heard and remembered, an argument occupying the least necessary time, and a decision based on sound principles, and advancing the law. I do not say that economy of time may not degenerate into parsimony. I once heard an argument, complete to the initiated, which consisted in the ejaculation of the title of one case by the leading counsel, and the response of another by the judge. The judgment which instantly followed pointed out the reasons why the latter authority had the judge's preference. I do not advise that all arguments should be so concise. But compare such an administration of justice with the prolonged throes of a tribunal struggling worthily but futilely towards a judgment. What searchings of mind, and sending for books ; what whirling words, and dazing thoughts ensue, when no one is self-confident what suggestions are fruitless, or where the real point is to be sought. One is reminded of Mr. Stanley, laboriously wandering nowhither, through sunless forests, with pygmies for guides.

Let me add a word on the rights of our posterity in this matter. We owe it to them to develop the law, as past ages have developed it for us. It is possible that some persons, though not, I believe, many, conversant with both systems, may prefer the crystallization of law in a code to its daily growth by argued instances. I confess that a code always seems to me like a travelling medicine-case, very neat and portable, but hardly adequate to cope with all the complex ills of humanity. But if law is to be made by decisions, it must, I think, be admitted that it is by the hands of great specialists that the work has been, and is, best done. The evolution of mercantile law, due to Lord Mansfield, was the result of his sitting day by day, and year by year, at the Guildhall, to hear the same class of cases, with almost always the same practitioners, and, it is said, generally the same jurymen before him. The construction of the system of equity, effected by Lord Nottingham, was the result of a man of vast ability and industry devoting himself to that particular branch of jurisprudence. If I may refer to a more modern instance, I should say that Sir Cresswell Cresswell, who devoted his consideration to the law of Probate and of Divorce, at a critical period of its existence, was

thus enabled to lay down and develop principles and practice, of which time has proved the value.

I had hoped when I chose my subject to refer, not only to specialism in law, but to specialism in lawyers; and to carry on the train of thought which I have ventured to place before you, into considerations connected with training for the law, and the pursuit of its practice. But, as frequently happens, my subject grew under my hand, and I must turn away. I will only say that no lawyer, be he student or practitioner, can be either too much of a general lawyer, or too much of a specialist. Lord Bacon said that he took all knowledge for his province. No mental digestion can hope to assimilate the whole *corpus juris*. But in, or nearly in, the sense in which, I take it, Lord Bacon employed his phrase, it is quite possible to grasp the principles which underlie all branches of law, and to follow out the relations of those branches to each other. To do this is to be a good general lawyer. But I venture to think that no student has gone as far as he can and should go, until he has thoroughly mastered some one branch of law. Such a study does more than give a grasp of that particular subject. English jurisprudence is so interwoven, that to be well acquainted with one part is to be not ill acquainted with many others. I might place this recommendation to you on the most practical grounds. To know, and to be supposed to know, one subject better than any one else, is no bad passport to success. There is a proverb, 'Beware of the man of one book.' I should say, beware of an antagonist with a speciality. But I venture to urge on you such a study, in the interests of something which success does not always give, but which failure cannot take away; in the interests of that keen appreciation of legal problems and their solution, which adds an intellectual charm to our daily work, and to which even the driest cases of our practice may be made to contribute. And I propose to you the welfare of this Society, as one having for its main object, to promote a scientific study of the law, and thus to implant and propagate a zeal, thoughtful and energetic, for the highest aims of our great profession.

F. H. JEUNE.

EXAMINATION AND CROSS-EXAMINATION AS TO CHARACTER.

THERE is, perhaps, no branch of our law which stands so much in need of codification as the Law of Evidence.

A long string of arbitrary rules takes the place of a systematic arrangement, on scientific principles, of statutory enactment and judicial decision; and although there is much rough fairness in the matter of the law, there is much that is anomalous and glaringly unfair. Nowhere is this more strikingly apparent than in that division which relates to Character. I purpose, as briefly as the largeness of the subject will permit, to consider the system of legal rules which constitute the Law as to Examination and Cross-Examination as to Character, with reference only to its main provisions and its so-called rational basis.

To point out defects is the province of the critic, to remedy them is peculiarly the duty of the legislator; therefore I do not intend, more than is absolutely necessary in order to the proper consideration of my subject, to suggest alteration or advocate change.

I would also premise that I intend to deal with 'Character,' as bearing upon both civil and criminal cases.

The general and primary rule of the Law of Evidence is, that nothing shall be given in evidence which does not directly tend to the proof or disproof of the matter in issue, and this rule holds good, with one important exception, which may be styled Evidence as to Character. But there are other *apparent*—though not real—exceptions, one or two of which necessitate some discussion before I turn to the subject proper.

Facts supplying motive, or constituting preparation for an act, or subsequent conduct apparently influenced by the doing of the act charged against a certain person can be given in evidence, in all criminal cases and certain cases of Tort; and it is sometimes urged that these facts do not tend to the proof or disproof of the matter in issue, but merely introduce prejudicial matter and serve the purpose of attacking the character of a prisoner or party to an action.

But this view is a distorted one, and is founded upon an inadequate appreciation of the Principles of Jurisprudence. That this is

so is abundantly clear when one reflects that the object of a trial is to arrive at the degree—if any—of a particular person's connexion with a particular act or omission, and that *motive*,—if reasonably capable of leading to the specific act or omission; *preparation* and *subsequent conduct* constitute three links out of four in the chain which binds the particular person to the particular act or omission; and it should further be borne in mind that the point in direct issue is not the evil reputation of the particular person, but his responsibility for an act or an omission which cannot be regarded apart from the circumstances in which the particular person was at a given time situated.

Therefore, it is necessary to admit evidence of any fact which serves to directly connect the particular person with the particular act or omission, no matter whether it be motive or conduct which can be regarded as a reasonable consequence of the act or omission. The jury are empanelled to test the importance of the evidence, and it is their duty to pronounce upon the significance of the various facts put before them under and by the authority of the presiding judge.

The case of Affiliation Proceedings is another instance of an apparent exception to the general rule. In such cases the defendant can cross-examine, and can contradict the evidence of, the plaintiff, with the object of showing that about nine months before the birth of the child in question, she, the plaintiff, had sexual intercourse with another man who might naturally be the father of the said child.

Now, it is very clear that such examination and cross-examination are not directed to impair the credit or destroy the character of the plaintiff, but are concerned with the real matter in issue, which is the paternity of the child. If the defendant can show that any other man equally with himself—assuming he admits having had sexual intercourse with the plaintiff—might naturally be the father of the child, he cannot be fixed with the paternity. Here, therefore, the main issue is concerned with the plaintiff's chastity, her personal conduct being directly in issue.

Another instance is the action for Damages for Seduction,—where the seduction is followed by the birth of a child, or at least by pregnancy, for in other cases, such as illness arising from the act of intercourse, it would for obvious reasons be difficult to cast any particular person in damages, and consequently many of the rules applicable to the first-mentioned case could not apply.

In this case¹, the defendant is permitted to cross-examine the woman whose seduction is in question, and contradict her by

¹ *Verry v. Watkins*, 7 C. & P. 310; and see *Eager v. Grimwood*, 1 Exch. 61.

independent evidence as to fact, time, date and place, for the purpose of showing that although he had sexual intercourse with her, he was not the father of her child, and in cases where illness follows pregnancy not resulting in the birth of a child, that he was not the cause of such illness, but, that a third person was the father of the child, or in the case of pregnancy and subsequent illness only, the cause of the illness.

Here, again, the evidence as to chastity goes right to the main issue, and is not adduced for the purpose of wrecking credit or character.

In this connexion, it is somewhat curious to note that in the case of *Reddie v. Scoolt*¹, Lord Kenyon non-suited a plaintiff who sued for damages for the seduction of his daughter, because he had allowed the defendant, *who, he knew, was a married man*, to visit and go alone to the theatre with his daughter. This seems to have been a correct decision of the learned judge, on the ground of estoppel by conduct. It is, however, suggested in Roscoe's N. P. Evidence, that the facts in this case might properly have been given in reduction of damages, but did not afford grounds for a non-suit. It is indeed difficult to deal with such a suggestion seriously, for in this case there was no question of 'character,' and indeed I venture to assert that in no action for seduction can the conduct of the *nominal plaintiff* be material to the claim for damages; but there was a question of conduct conducing to the commission of the tort, and if Reddie had merely been, as it seems probable that he was, exceedingly simple, the judge would have done right in non-suiting him.

I should add that it is true that Lord Kenyon found the foolish father guilty of 'gross' misconduct, but 'gross' is probably merely vituperative.

And as to actions of Defamation. I shall deal with them in another part of this article, in so far as the issue is the measure of damages; therefore it is only necessary to say here, that when the main issue of an action of defamation is general reputation, the issue can be fought, and is properly fought, by calling evidence or cross-examining as to character². In other words, where general character is in issue, evidence of general reputation can be adduced.

Of course I am not concerned with actions founded on specific misconduct, for there the question is the truth or untruth of a definite allegation and not character.

In all the cases I have already dealt with, and indeed in every other civil case, except those which I shall presently mention, it is

¹ *Reddie v. Scoolt*, Peake, 239; and see *Hodges v. Windham*, Peake, 39; 3 R. R. 649.

² *Foulkes v. Selway*, 3 Esp. 236.

abundantly clear that what is sometimes termed cross-examination and examination as to character is nothing more than a mode of fighting the general issue.

And now I come to the question of 'Character' itself, and at the outset I am confronted with a difficulty which arises from the use by lawyers of the word character in both its strictly legal sense—*general reputation*—and its popular sense—*disposition*. This difficulty I will briefly deal with.

Every lawyer knows that it is trite law that unless the prisoner—I speak now of criminal cases—offers evidence of his good character, his bad character is irrelevant to the issue which is being tried.

His character is not deemed to be in question, and yet, despite this excellent and most salutary rule, there are a large number of cases in which the Crown can adduce evidence, not only of previous and subsequent wrongdoings¹, but also of previous convictions² of the prisoner. In other words, where it is requisite to prove a guilty knowledge, a mass of evidence to prove such *knowledge* is let in, and the whole of the evidence, so made admissible, refers to the disposition of the prisoner, and tends to show that he is a *likely man* to commit the particular offence; e.g. receiving goods, knowing them to have been stolen.

Now this seems to me to be perfectly indefensible, for there is no question here of proving intent,—which as being a part of a criminal act it is quite justifiable to do,—but in the most barefaced manner the Crown, on the trial of a prisoner on one charge, asks the jury to pronounce judgment on a variety of past offences and wrongdoings of which the unfortunate prisoner is or has been proved to be guilty. Such a practice, I maintain, is theoretically absurd and practically indefensible, for, putting aside the ludicrous folly of inviting the typical jurymen to work out the most delicate and subtle of metaphysical problems, one man has enough to do to answer one charge at one time; and further, to ask a jury to find a prisoner guilty of a specific charge because he has done wrong on previous occasions, is positively cruel in its injustice.

The provisions of 34 & 35 Vict. c. 112. s. 19, which legalize the practice, are a monument to the wrong way of doing things, and it is hard to believe that a *lawyer* could have taken part in framing them. That a man is presumed to be innocent until he is proved to be guilty, is a maxim one hears much about, and it is a matter for wonder and regret that those who admire its spirit, do not make strenuous efforts to ensure the fair trial of every prisoner.

¹ E.g. *Reg. v. Salt*, 3 F. & F. 834.

² *Reg. v. Weeks*, L. & C. 18; and *Reg. v. Frith*, L. R. 1 C. C. R. 172.

It is boasted that a jury are sworn to pronounce on the evidence submitted to them in relation to one issue, but in many cases they sit to decide if the disposition of a criminal is likely to lead him to commit certain crimes!

Now leaving this point and coming to the consideration of the *general reputation*, which the law ostensibly considers to be a convertible term with character—although it does sometimes use the word to signify disposition—it may be asked—and not impertinently—what reason is there in allowing witnesses to character to give evidence¹? It may well be asked, for except in Rape, and analogous cases, and certain actions for damages, those witnesses simply prove nothing, since in the first place they are only permitted to speak *generally*, and are not allowed—except in cross-examination—to give reasons for their belief; they must not descend to particulars and are not permitted to speak of their own knowledge. In fact, as Sir James Stephen points out, in his work on the Law of Evidence, a witness who knows that a man to whose character he is called to testify is a habitual receiver of stolen goods, can, if the prisoner is a hypocrite and possesses a good reputation, with perfect truth give him the highest character the law tolerates. I do not say that witnesses who would give information as to the past conduct of the prisoner might not be of some service to the judge after verdict returned, and assist him in meting out punishment, but they would not, even then, if they had to answer the ridiculous question in the ridiculous manner which is prescribed. Sir James Stephen says that in practice, the question ‘What is the general reputation of the prisoner as a humane, honest and moral man?’ is answered particularly, and not as directed in the leading case of *Reg. v. Rowton*. Well, that may be, but it is not legal all the same, and a verdict obtained on an answer purporting to give the personal opinion of the witness would undoubtedly be upset; and further, if anything is to influence the jury, it surely should be the disposition of the prisoner, and not his reputation, no matter how unerring popular judgment may be!

But as I have before said, what has disposition to do with a particular offence? Is it not, humanly speaking, absurd to ask a jury to find a man not guilty of embezzling the funds of a Building Society, because he has hitherto borne a good reputation? Assuredly so, and yet it is done almost daily. And what is the practical result of the system?

Bad, even ludicrous! Since there is no man so poor as not to

¹ *Reg. v. Rowton*, 1 L. & C. 520; *Reg. v. Turberfield*, 34 L. J. M. C. 20; *Scott v. Sampson*, 8 Q. B. D. 471.

be able to afford a witness to character, and the worst murderer and most brutal violator of children never lacks a friend who will speak for him in the hour of need. The jury—save on the rarest occasions—pay no attention to such witnesses, and why it is allowable to take up the time of the court in dealing with them passes my power of comprehension. It is as unreasonable to ask a jury to acquit a bigamist because he has hitherto borne a good character, as it is cruel to ask them to convict a man of ‘receiving,’ because in a state of semi-starvation four and a half years ago he stole a halfpenny bun. And yet, the law on the subject is accurately illustrated in the foregoing paragraph.

Now just a word on the cross-examination of witnesses.

Many people—drawn mainly from the ranks of the educated semi-learned class—think that witnesses should be protected, but it is hard to see what they should be protected against! Surely the most stupid peruser of the daily papers knows that—except as to character—the witnesses in any case depose to facts in issue or relevant to the issue, and their evidence rests on their own oaths. On their statements the party calling them relies to gain his verdict, and it is only common fairness that the other side should have the right of testing their credibility and credit.

The basis, the strength of a man’s testimony is his character,—here again character is used in its popular and not strictly legal sense,—i. e. his disposition, and acts being the only external indices of the disposition, the jury should be placed in possession of them. The issue here is not the guilt of *A* or the innocence of *A*, but whether or no *B* the witness is credible. If *A*’s guilt were in direct issue, *B*’s opinion of him and *A*’s previous reputation or disposition as evidenced by conduct, should be left out of all consideration, for it is the jury who are to judge on the facts connecting *A* with the act or omission in question, of his guilt in reference to a particular charge. It is agreeable to reason that every witness should be tested, but it is unreasonable in the highest degree to allow witnesses to be called who shall swear generally that, in their opinion, founded on their own knowledge of a particular witness, the particular witness is unworthy of credit on his oath. This however it is permissible to do, and not only can witnesses be called to impeach the credit of witnesses impeaching credit, but fresh evidence can be adduced to rehabilitate the credit of the witness impeached. I append an illustration of what is legally permissible and is sometimes acted in criminal courts.

A prisoner (charged with simple larceny) calls *A* to prove that he, the prisoner, is a man of good reputation, i. e. sound character. The question which the prisoner is entitled to ask his witness is,

'What is my general reputation as a moral, honest man?', and the witness's proper answer is, although he knows that in spite of a good reputation, the prisoner is in reality a disreputable thieving voluptuary, 'your character is excellent.' The Crown then puts in a previous conviction against the prisoner, [N.B.—This course can be taken in almost every conceivable case if the prisoner has been previously convicted], and calls a witness to prove that the prisoner bears a bad reputation, i.e. bad character. When the Crown has concluded its evidence of bad reputation, the prisoner at once calls a witness to swear that from his knowledge of the Crown's witness, he would not believe him on his oath¹. The Crown then calls a witness to swear that the reputation of its impeached witness is good, and that he is worthy of credit, and another witness to swear that the impeaching witness is unworthy of credit,—and this performance may be carried on *ad infinitum*.

This illustration supplies in itself all necessary comment, but it may be as well to sum up the existing rules on the subject by saying, that, in every case, both civil and criminal, the credibility and credit of a witness may be impeached, whereas the character of the defendant, unless it constitutes itself the main issue, is only relevant in criminal cases and certain civil actions for damages.

The rule as to contradicting witnesses who have in cross-examination been asked questions which were put solely for the purpose of impairing their credibility, is that except in two cases no evidence to contradict is admissible. The two cases—I quote from Sir James Stephen's work on Evidence—are

(1) 'If a witness is asked whether he has been previously convicted of any felony or misdemeanour, and denies or does not admit it, or refuses to answer, evidence may be given of his previous conviction thereof².'

(2) 'If a witness is asked any questions tending to show that he is not impartial, and answers it by denying the facts suggested, he may be contradicted³.'

Here again I submit that it is logically absurd to ask a jury to infer that a man is not entitled to credence, because he has been convicted of a felony or misdemeanour, and the statutory enactment on the subject seems to be, and is, in practice, found to be, pernicious. Its absurdity is apparent when one remembers that to send by post a pair of scissors which is not properly protected is a misdemeanour. As to the second case; there seems to be no objection to the rule contained in it, for after all, it merely amounts to cross-

¹ *Reg. v. Brown*, 1 C. C. R. 20.

² 28 & 29 Vict. c. 18. s. 6.

³ *A.-G. v. Hitchcock*, 1 Ex. 91.

examining a witness with reference to facts, on the evidence of which and their tendency the jury may decide.

But to deal with those criminal cases in which character is *properly* deemed to be a matter of great importance, and wherein, although it is not generally admitted, one of the issues is character,—using the word in its popular sense.

The cases are rape; assault with intent to ravish; and indecent assault amounting in substance to an attempt at rape. In all these cases the prisoner may adduce evidence that the prosecutrix is a woman of generally immoral character, or is a common prostitute, and this he may do whether she is cross-examined or not as to her previous conduct and mode of life¹. If she is cross-examined, she can be asked, whether she has had at any time illicit connexion with a man other than the prisoner, and probably can be compelled to answer, but if she denies it, she cannot be contradicted². But if she denies that at any time previously to the occasion charged she had connexion with the *prisoner*, she can be contradicted. The reason for this distinction was given by Lord Coleridge in *Reg. v. Riley*. He said, as to the first case: 'It should in my view be rejected, not only upon the ground that to admit it would be unfair to the woman, but also upon the general principle that it is not evidence which goes directly to the point in issue at the trial It is obvious too that the result of admitting such evidence would be to deprive an unchaste woman of any protection against assaults of this nature;' and as to the second case: 'To reject evidence of her having had connexion with the particular person charged with the offence is a wholly different matter, because such evidence is in point as making it so much the more likely that she consented on the occasion charged in the indictment.'

Kelly C.B., in *Reg. v. Holmes*, stated that evidence as to the prosecutrix having previously had connexion with the prisoner was admissible, 'for it has a direct bearing upon the question of consent,' but that cross-examination as to connexion with others was 'as to a collateral point.' These *dicta* represent all the reason there is for the distinction; and now briefly to examine the distinction which is most profoundly arbitrary, and so fine that the more acute the perception the harder it is to appreciate. What is the main question to be tried in a case of Rape? *Consent*. What is the issue when the act of connexion has been proved? 'Did the woman *consent* to have sexual intercourse with the prisoner?' The prosecutrix says No, and the prisoner says Yes. There are seldom any witnesses

¹ *Reg. v. Riley*, 18 Q. B. D. 481; *Reg. v. Clarke*, 2 Stark. 242; *Reg. v. Holmes*, L. R. 1 C. C. R. 334.

² *Cundell v. Pratt*, Moo. & M. 108; but see *Reg. v. Cockcroft*, 11 Cox, 410.

of the occurrence, and as the jury have to decide upon probabilities rather than facts, character—in its popular sense—becomes a very important matter, for the disposition or profession of the prosecutrix supplies the jury with material to work upon. It would be better if the jury could, on circumstantial and direct evidence as to facts, found their verdict—which they can well do in cases where ‘guilty knowledge’ is charged; but in nearly every rape case, the nature of the case does not allow them to do so. It is necessary in rape and the analogous cases to work on probabilities, and the mode of life of the prosecutrix is an all-important index to those probabilities. Now, having admitted that evidence as to disposition is necessary in these cases, why, in the name of common sense, should any distinction be made in what I have termed the first and second case in Lord Coleridge’s judgment?

In the second case: the prosecutrix can be contradicted, because it is so much the more likely that she consented, &c.

Lord Coleridge in saying that overlooked the fact that this reason exists also in the first case with nearly as much force as in the second.

Is not the whole soul of the reason for admitting evidence in contradiction centred in the assumption that a woman who has been immoral once is more likely to be immoral again than a purely virtuous woman? And if such is the case, which few if any will deny, of what importance is the personality of the paramour except in so far as there is a question of *degree* of probability.

But there is another ground for the distinction, it is said, which consists of the hardship of starting upon the prosecutrix a ‘multitude of collateral issues.’

Well, there is not much in that ‘ground,’ seeing that consent is one of the two vital issues in rape. But even supposing it were not, surely such hardship as is involved in setting the prosecutrix to answer collateral issues is more than counterbalanced by the protection the practice would afford against the tribe of blackmailers: and I venture, with diffidence, considering the eminence of those with whom I have the misfortune to differ, to assert that character, i. e. disposition, in a case of rape is not a collateral issue, but *the* issue, when the fact of connexion has been established.

Therefore all evidence relevant to that issue should be admissible, and any statement made by the prosecutrix as to consent should be freely and fully investigated. The character of the prosecutrix being the key to the probability of her story, should be examined with the utmost care. On this view, I quote the words used by Mr. Justice Williams in the case of *Reg. v. Martin*¹, with which

¹ *Reg. v. Martin*, 6 C. & P. 562.

I respectfully and entirely agree. 'The doctrine that you may go into the general bad character of the prosecutrix and yet not cross-examine as to specific facts, I confess, does appear to me not to be quite in strict accordance with the general rules of evidence.'

Before I proceed to deal with character in reference to damages in civil actions, I will advert to a most curious case, which it is difficult to arrange under any head, but which it is proper to include in an article on examination as to character. It is that of *Provis v. Reed*¹.

There the character of a dead man, who was one of three attesting witnesses to a will—which as solicitor to the testator he had prepared—was attacked, with the object of showing that the particular will was a forgery, and that the deceased had been an active participator in a gross fraud. The point in issue was the validity of the will, and Mr. Justice Gaselee admitted evidence to prove that the deceased attesting witness bore a very high character, and his ruling was upheld by Best C.J., Park J., and Burrough J.

The ground for admitting the evidence was thus given by Best C.J.: 'In such a case' (namely one, where the action was brought twenty-seven years after the transaction to which it related), 'there is no way of protecting the character of a witness other than the admitting such evidence as has been here received.' 'In many cases necessity forms the law, . . . the common practice of Westminster Hall has always been to receive it';—(i. e. evidence as to character). 'That practice, perhaps, is better evidence of the law even than decided cases.' This was how Best C.J. reconciled Mr. Justice Gaselee's decision with Law, but it is impossible to defend this and similar decisions on any principle of law, and as for 'necessity,' it may know no legal limits, but the bounds of absurdity should surely restrain it. It certainly crossed those bounds in the case of *Provis v. Reed*. The objection to such evidence I have given already in this article.

In civil cases the character of the plaintiff, though generally irrelevant, is sometimes a very material question. I have before spoken of those cases in which the main issue is character, and now I will deal with those in which character is of extreme importance, as affecting the measure of damages.

A full list of cases in which evidence of general bad or good character may be given, is libel, and slander, where character is not the general issue; seduction ('malicious prosecution' was, but is so no longer)²; breach of promise of marriage; and two cases in

¹ *Provis v. Reed*, 5 Bing. 435; see also *Doe d. Walker v. Stephenson*, 3 Esp. 284, and the *Bishop of Durham v. Beaumont*, 1 Camp. 210.

² *Rodriguez v. Tadmiri*, 2 Esp. 721; and *Newsam v. Carr*, 2 Stark. 70.

connexion with wills. And first in actions of Defamation: the plaintiff cannot adduce evidence of general good character, unless and until either evidence of general bad character has been adduced by the defendant, or the defendant has cross-examined the plaintiff's witness *successfully* as to plaintiff's bad character¹.

It is however doubted whether an unsuccessful cross-examination as to character does not entitle a plaintiff to give evidence of general good character, but after careful consideration, I have come to the conclusion that it does not.

In an action for damages for Seduction, the nominal plaintiff is not the woman who has been seduced, but the master of the woman who sues on account of the damage he has sustained by the loss of his servant's services. Therefore, in this action, the general bad character of the 'servant' may be given in evidence by the defendant, and if he adduces such evidence, or proves by cross-examination, that the 'servant' was not of good general character, the plaintiff then, and only then, can give rebutting evidence of his 'servant's' good character².

The character of the plaintiff is, I submit, not material on the question of damages, although some of our judges presumably think it is. It is, however, inconceivable to me why the fact that *A* has been fined for 'sleeping out' should diminish his interest in his 'servant' and lessen the value of his servant's services to him, and arguing from first principles in the absence of authority, I have come to the above conclusion³.

In actions for damages for Breach of Promise of Marriage, where the defendant by his plea sets up a general charge of immodesty, the plaintiff may, before she is even cross-examined on the point, give evidence of her general good character for modesty⁴.

Now in all the foregoing cases, character, i. e. reputation, is in issue, since it touches the damages. In defamation cases, the complaint that the plaintiff makes is that his reputation is wounded: he seeks money compensation for the partial, if temporary, injury that has been done to his *existimatio*.

'I am a man of good character,' he says in effect, 'and the defendant has, as you have found or been told, made an unjustifiable attack on it.' His reputation is the basis of his grievance, and the higher it is, the more sensitive it is, and the greater, in proportion to the hurt done it, is the injury the owner has received. It is quite reasonable then, that the defendant should be allowed to offer

¹ *King v. Francis*, 3 Esp. 116.

² *Dodd v. Norris*, 3 Camp. 519, 14 R. R. 832; but see *Bate v. Hill*, 1 C. & P. 100; *Bamfield v. Massey*, 1 Camp. 460.

³ *Reddie v. Scott*, Peake, 240.

⁴ *John v. James*, 18 L. T., N. S. 243.

disparaging evidence of the value of that reputation, and it is only fair that the plaintiff should be allowed to adduce rebutting evidence.

On either side there should be no restrictions placed, and yet there is, for unless the defendant justifies, he cannot without the leave of the judge give evidence of bad reputation if he has not, at least, seven days before the trial, given notice to the plaintiff, and furnished him with particulars of the matters as to which he intends to give evidence¹. And not only should there be no restriction placed on the parties, but the defendant should be allowed to give evidence of particular instances of misconduct, in order to attack the character of the plaintiff.

It is beside the mark to say that the plaintiff would have too many issues to contend with, for *the* issue as to damages in a defamation action, is the *value* of the particular character which has been attacked. I am not now considering special damage, which is in itself another issue, distinct from that of general damages. Evidence of mere rumours and suspicions should certainly not be admitted, but *facts* which tend to detract from the plaintiff's reputation and are indisputable can for no good reason be excluded.

The restrictions enumerated by Mr. Justice Cave in the case of *Scott v. Sampson*² should speedily be removed.

In the cases of seduction and breach of promise also, pretty well the same considerations apply, but hardly so strongly in the second as in the first case. However, the difference, if any exists, is but slight, and there is very little of the comment made above on the law relating to character in defamation cases that is not equally applicable to both.

I have now dealt as fully as within the prescribed limits it was possible for me to do with this important subject. I fear that I can hardly lay claim to credit for having made generally interesting an article which, by reason of the magnitude of the subject, is necessarily sketchy, and which, overlaid as it is by technicalities, cannot be anything but 'dry'; but if I have clearly put before my readers the necessity of alteration, radical and sweeping, in the body of the Law of Evidence, my object has been attained. Whether my strictures are deserved, whether they are well founded, is a matter which can bear but one opinion. As to the necessity of the irrationality of the rules, there may be a diversity of opinion. For my own part, I am optimistic enough to think that some good may be effected by one who possesses sufficient influence and ability to bring about all necessary changes in the law as it now stands.

ERNEST BOWEN-ROWLANDS.

¹ R. S. C., O. 36. r. 37.

² *Scott v. Sampson*, 8 Q. B. D. 491.

SUGGESTIONS FOR THE CODIFICATION OF THE LAW OF GENERAL AVERAGE.

IN a paper read last May before the Committee of Lloyd's, Mr. Douglas Owen advocates the possibility and the expediency of abolishing general average. The Committee of Lloyd's is strong, but it may well be doubted whether any Committee, however strong, could by a resolution put an end to a legal institution that is coeval and coextensive with modern and mediaeval as well as to some extent even with ancient civilization. The expediency of abolishing general average is even more questionable. It is urged on the ground that a great insurance company contributes to general average as much as it receives from general average, which is no doubt true; but Mr. Owen goes on to say, as for the sake of his argument he is bound to do, that all interests are, or at least ought to be, insured—a statement which is manifestly valueless as a premise to Mr. Owen's conclusion unless it is wholly true, but one which is equally clearly only partially true. Mr. Owen further maintains that general average is not only useless but expensive, and asserts, probably quite accurately, that out of £100 paid by an insurance company in claims, £8 10s. is paid in respect of general average, and that out of this £8 10s. the adjuster's fees amount to ten shillings, while another ten shillings is spent in surveys and other expenses attending adjustment. What one would like to know is how much of the ten shillings spent in surveys would be saved if general average were abolished, and whether underwriters would not find their office and arbitration expenses increased by more than ten shillings if average adjusters, who are in fact semi-official arbitrators and accountants, were not called in.

However this may be, general average still exists, and is likely to exist for many centuries to come, and as long as it exists it is admitted on all hands as desirable that the law relating to it should be codified. That such a task presents great difficulty is also admitted, but there does not appear to be any insuperable obstacle to its achievement. If the attempts hitherto made have not been altogether successful, their failure may perhaps be attributed to the principle upon which they have been undertaken, namely, the classification of facts rather than the codification of

law; a classification of facts is, necessarily, on the one hand lengthy, and on the other hand incomplete. In order to avoid these dangers the scope of the following code has been carefully confined to the determination of the principles which underlie the decisions of the English Courts of Justice, all questions of fact being remitted to the province of appropriate tribunals. The temptation throughout has been to multiply references, and in disputed cases to compare the law of other countries and the practice of average adjusters with what is conceived to be the law of England; a necessarily limited space has, however, made it impossible to refer even to the works of eminent British adjusters, much less to the provisions of foreign law.

It should perhaps be added that the Insurance Bill now before the House of Lords does not deal with the subject of general average, except in its relation to insurance.

SUGGESTED CODE OF ENGLISH LAW RELATING TO GENERAL AVERAGE.

1. General average is loss incidental to a maritime adventure, which two or more parties to the adventure are by law compellable to bear proportionally to their interests in the adventure; provided that salvage is not general average.

2. General average is in every case occasioned by an act or series of acts called a general average act.

No act is a general average act unless it has each and all of the characteristics enumerated in sections 5 to 10.

The amount of a general average is determined at the place specified in section 11 and according to the rules laid down in sections 12 to 17.

General average is contributed to by the persons specified in section 18 proportionally to the amounts of their interests as ascertained by sections 19 to 24.

The right to claim and to resist contribution is limited by certain rules specified in sections 25 to 27; is subject to contract and custom to the extent specified in sections 28 and 29; and may be enforced by the means specified in sections 30 to 32.

Note to section 1. This section is an explanation of the term general average, rather than a definition of its nature. It excludes, however, the use of the word average as the equivalent of contribution, which use has not only caused much confusion, but is moreover improper, because it is inapplicable to the expression 'particular average.' 'Average,' or loss at sea, is called general

when it will ultimately fall on certain persons generally; it is called particular when it will fall on one person particularly.

The whole of this code is an attempt to determine in what cases and in what way average is general.

Lowndes treats salvage as a typical general average expenditure, and no doubt sums paid in settlement of a salvage claim are often adjusted as general average. For the purposes of a code, however, it would seem preferable to observe the distinction between incurring salvage liability and hiring services when in distress so as to create a general average; a distinction which is clearly brought out by the judgments in the Court of Appeal in *Ocean Steamship Co. v. Anderson*¹. Salvage services are paid for only if successful, hired services must be paid for according to the terms of the contract by which they are hired; remuneration for salvage services is recovered by an action *in rem* against the property salvaged, remuneration for hired services is recovered by a personal action against the person who hires them. It is with the latter of these alone that this code is concerned. The inconvenience of including salvage in general average arises from two causes; first, there is included in salvage much which is not general average, and secondly the values which contribute to salvage should theoretically frequently be, and practically sometimes are, different from those which contribute to general average.

Note to section 2. An act necessarily involves a determination of will producing an effect in the sensible world². By making general average dependent upon an act there is at once introduced that circumstance which has always been insisted upon as essential to general average, the fact that the loss must have been voluntarily incurred—*Price v. A. I. Ships' Ins. Association*³; *Ocean S.S. Co. v. Anderson*⁴; *Kemp v. Halliday*⁵.

The English Courts have never adopted the view of Benecke that an act is not voluntary unless an alternative act is practically possible.

A General Average Act.

3. When a series of acts constitutes a single process, such a series is for all the purposes of this code deemed to be one act.

4. A general average act is an act which has all the six characteristics specified in sections 5 to 10.

5. It is an act performed in the course of a maritime adventure.

6. It is an act whereby money or money's worth is parted with.

7. It is an act of an extraordinary nature. For the purposes of this code an extraordinary act occurs only when—

(a) Services or materials are procured by a person who is under no contractual liability to supply such services or materials; or,

¹ 13 Q. B. D. 651.

² Holland's Jurisprudence, sixth edition, p. 93.

³ Fry L.J., 22 Q. B. D. at p. 590.

⁴ Bowen L.J., 13 Q. B. D. at p. 666.

⁵ Blackburn J., 6 B. & S. at p. 746.

(b) Property is used for a purpose for which no part of it was originally intended to be used.

8. It is an act done with a view to preserve from destruction two or more of the following interests:—

(a) The interest of each cargo owner in the preservation of his cargo from injury or destruction.

(b) The interest of the shipowner in preserving his ship and its equipment from injury or destruction.

(c) The interest of the shipowner or other person who will receive the freight to be earned on the voyage in the earning of such freight.

(d) The interest of a person who has paid advance freight in the safe arrival of the goods on which he has paid freight, provided that such freight is not recoverable.

Sub-section. An act which does in fact benefit two or more of the interests specified in this section is presumed to have been done with a view to benefit each of such interests. Such presumption may, however, be rebutted by showing:—

(a) The desperate condition of such interests collectively; or,

(b) The insignificance of the general benefit as compared with the benefit derived by one particular interest.

9. It is an act done in time of peril to preserve from a common imminent danger each of the interests for whose benefit it is done. No act done after any one of such interests is in safety is, as regards that interest, a general average act.

10. It is an act which is necessary and necessitated by the failure of ordinary acts.

Sub-section. An unnecessary act is deemed to be necessary in so far as it renders a necessary act unnecessary.

Note to section 3. The consideration of what acts or series of acts constitute a single process is of great importance, for in this code there are included as general average expenses only those expenses which are incurred in the performance of a general average process: no other expense is deemed to be due to a general average expense. The reasons for this are fully dealt with in the note to section 13; but it may be well to remark at once that the cost of repairing damage done by a general average act stands on a different footing; such cost is the measure of the damage done by the act occasioning it: it is very rarely in itself a general average expense.

Whether or no any particular series of acts constitutes a single process is a question of fact depending on all the circumstances of each case. Thus in *Svensen v. Wallace*¹, where a ship sought a port of refuge in such circumstances that a general average was occasioned, and the question was as to which of the expenses

¹ 10 App. Cas. 404.

incurred were properly chargeable to general average, Lord Justice Bowen, in the Court of Appeal¹, held that the question was one of fact, and in this opinion he was supported by Lord Blackburn in the House of Lords².

The following series of acts have been held to constitute a single process.

In *Svendsen v. Wallace*³, where a ship requiring repairs sought a port of refuge and the cargo was discharged in order to effect such repairs, it was held that going into the port and there discharging the cargo was a single process, known as 'going in to repair'; the repairing of the ship, the warehousing and reshipment of the cargo, and the leaving of the port were, however, held not to constitute part of that process, the dicta of Chief Justice Cockburn and Lord Justice Thesiger in *Atwood v. Sellar*⁴ being thus overruled.

According to Lord Justice Bowen in *Svendsen v. Wallace*⁵, it would seem that where a ship seeks a port of refuge merely for shelter, the entering, staying at, and leaving the port are a single process.

In *Moran v. Jones*⁶, where a ship containing a cargo belonging to the shipowner struck on a bank near Liverpool and was much strained and twisted, the decks rising about two feet, it was held that sending the materials of the ship and the cargo in lighters to Liverpool, scuttling the ship, jettisoning 300 tons of ballast, pumping and floating the ship, towing her to Liverpool and there discharging the remaining ballast, all constituted one process, that is to say, 'getting the ship off the bank and sending her to be repaired.' Lord Esher in *Svendsen v. Wallace*⁷ said that he considered this case to be overruled, but inasmuch as it is a decision on the facts, it can hardly be said to be actually overruled, particularly as it has been favourably or at least neutrally commented on in the Exchequer Chamber in *Walthev v. Mavrojeni*⁸, as well as by Lord Justice Bowen in *Svendsen v. Wallace*⁹, and by Mr. Justice Wills in *Royal Mail Co. v. Bank of Rio*⁹.

In *Job v. Langton*¹⁰, where a ship was stranded on the coast of Ireland, so as to be high and dry at low water and the cargo was discharged and sent to Dublin, it was held that the subsequent floating of the ship with the aid of a steam tug and by cutting a channel was in itself a complete process, and independent of the lightening of the ship.

The facts of the decision in *Walthev v. Mavrojeni*⁷ were very similar to those in *Job v. Langton*.

Note to section 4. No act is a general average act which fails in any of the six characteristics given in the code; on the other hand these six characteristics are alone essential. Thus it is immaterial whether the act be successful or not, or whether it be done by the

¹ 13 Q. B. D. at p. 85.

² 4 Q. B. D. at p. 360; 5 Q. B. D. at p. 290.

³ 13 Q. B. D. at p. 90.

⁴ 13 Q. B. D. at p. 80.

⁵ 13 Q. B. D. at p. 93.

⁶ 6 E. & B. 779.

⁷ 10 App. Cas. at p. 414.

⁸ 7 E. & B. 523.

⁹ L. R. 5 Ex. at p. 122.

¹⁰ 19 Q. B. D. at p. 371.

master of the ship, or by any other person—*Price v. Noble*¹; *Mouse's case*².

Note to section 5. Where there is a charter-party, the adventure begins with the taking effect of the charter-party—*Williams v. London Assurance*³; otherwise it begins with the first loading of cargo—*The Carron Park*⁴; it does not end until all the cargo is discharged—*Whitecross Wire Co. v. Savill*⁵.

Note to section 6. It is clear that there is no sacrifice unless money or money's worth is parted with. One cannot recover contribution to a loss which has not actually been sustained.

Note to section 7. It has never been disputed that a sacrifice or expense is not general average unless it is extraordinary. It is however no easy matter to decide in what sense the word extraordinary is to be interpreted. A sacrifice or expense may be extraordinary in its nature, or in its amount, or in its occasion, or in its motive, or in its results. Each of these interpretations has in turn been contended for as the basis of general average: several have been adopted by foreign laws, several have been adopted by the York Antwerp Rules, but the English Courts have persistently rejected all except that which is adopted in this code. Thus it has been held that an act is not extraordinary merely because the amount of loss resulting from it is extraordinary—*Harrison v. Bank of Australasia*⁶; *Wilson v. Bank of Victoria*⁷; nor because the occasion on which it is done is extraordinary—*Taylor v. Curtis*⁸; nor because the motive with which it is done is extraordinary—*Covington v. Roberts*⁹; *Power v. Whitmore*¹⁰; nor because the results which follow from it are extraordinary—*Hills v. London Assurance*¹¹; but only because it is extraordinary in its nature, and for no other reason—*Birkley v. Presgrave*¹². The conclusion therefore is that the extraordinary element which is essential to general average, is to be found alone in the extraordinary nature of the act which occasions it¹³. This conception is expanded in the subsections.

- (a) The effect of the decisions appears to be, that the criterion between ordinary and extraordinary expenses is the contractual obligation which is incidental to the former alone; thus in all those cases where it is said that expenses incurred by the shipowner in the fulfilment of his ordinary duty are not general average, it will be observed that it is the contractual duty of the shipowner that is referred to—*Kemp v. Halliday*¹⁴; *Atwood v. Sellar*¹⁵; *Svensen v. Wallace*¹⁶; *Schuster v. Fletcher*¹⁷. The duty of the shipowner as bailee of the cargo and *negotiorum gestor* is not, in the absence of actual agreement, contractual.

¹ 4 Taunt. 123, 13 R. R. 566. ² 12 Co. Rep. 63. ³ 1 M. & S. 318, 14 R. R. 441.

⁴ 15 P. D. 203. ⁵ 8 Q. B. D. 653. ⁶ L. R. 7 Ex. 39. ⁷ L. R. 2 Q. B. 203.

⁸ 6 Taunt. 608, 16 R. R. 686. ⁹ 2 B. & P. (N. R.) 378, 9 R. R. 669.

¹⁰ 4 M. & S. 141, 16 R. R. 416. ¹¹ 5 M. & W. 569. ¹² 1 Esat 220, 6 R. R. 256.

¹³ See postscript hereto, p. 47. ¹⁴ L. R. 1 Q. B. 520.

¹⁵ 4 Q. B. D. 342, 5 Q. B. D. 286. ¹⁶ 13 Q. B. D. 69, 10 App. Cas. 404.

¹⁷ 3 Q. B. D. 418.

- (b) The result of the cases seems equally clear that the criterion of extraordinary sacrifice lies in the way in which the sacrificed property is used. If it is used for the purpose for which it was intended, then, although the motive with which it is so used is extraordinary, the sacrifice is not general average; if, on the other hand, property is damaged by being used for a purpose for which it was not intended, the sacrifice is then extraordinary—*Harrison v. Bank of Australasia*¹; *Wilson v. Bank of Victoria*²; *Birkley v. Presgrave*³.

Note to section 8. It has so often been said that a general average act must be done for the benefit of 'the whole adventure,' 'ship, freight, and cargo,' 'the whole concern,' and the like, that it is necessary to account for the view which is here taken as to the fundamental nature of general average. The fact is, that in almost all the cases which have come before the Courts, the cargo as well as the ship and freight has actually been in peril. This is no doubt due to several causes. In the first place, when ship and freight are in peril it generally happens that the cargo is in peril also; secondly, the interests of ship and freight are often combined in the same person; and lastly, it appears from the report of *Hall v. Janson*⁴, that there was during a long time a custom at Lloyd's for underwriters on freight not to contribute to general average. For these reasons then there is not any great body of authority for the proposition that there may arise a general average as between any smaller number of interests than all those involved in the adventure. The decision however in *Hall v. Janson*⁴ is decisive in favour of such a proposition, which is moreover in accordance with the dicta of Chief Justice Campbell in *Moran v. Jones*⁵, and of Lord Justice Bowen in *Svensen v. Wallace*⁶. The expressions 'ship, freight, and cargo,' 'the whole adventure,' and so forth, are to be interpreted with reference to the facts of the cases in which they are used. See however the *Brigella*⁷.

It is hardly necessary to quote authorities to show that the interests enumerated in the section are the only interests which are the subject of general average. The way in which the values of such interests are ascertained is described in sections 21 to 24.

It has often been attempted to bring the interest of the cargo owner in the arrival, as distinct from the safety, of his cargo within the scope of general average, but such attempts have always failed in the English Courts—*Walthew v. Mavrojan*⁸; *Hallet v. Wigram*⁹.

The interest of a shipowner in a peculiarly lucrative charter-party might well be made the subject of general average, though only to such extent as the value of the charter-party exceeded the market value of the freight at the time; but it would be difficult to make a charterer pay contribution for release from an onerous charter,

¹ L. R. 7 Ex. 39.

⁴ 4 E. & B. 500.

⁷ 93, P. 189.

² L. R. 2 Q. B. 203.

⁵ 7 E. & B. at p. 532.

⁸ L. R. 5 Ex. 116.

³ 1 East 220, 6 R. R. 256.

⁶ 13 Q. B. D. at p. 92.

⁹ C. B. 580.

and on the whole it seems best to exclude all interests not involved in the particular voyage; though where a vessel is chartered for a round voyage, homeward as well as outward freight is included in the voyage—*Williams v. London Assurance*¹.

Note to subsection (a). The authority for this is to be found in the decision, and more particularly in the judgment, of Lord Esher in the *Walter Raleigh*, an unreported case decided in the Court of Appeal in 1892. It is an expression of the *sauf qui peut* doctrine.

(b). Where specie was saved from a stranded ship it was held that this was not done with a view to lighten the ship—*Royal Mail Co. v. Bank of Rio*²; *Lush J. in Dent v. Smith*³.

Note to section 9. From *Job v. Langton*⁴, decided in 1856, to *Srensdén v. Wallace*⁵, decided in 1885, there is abundant and consistent authority for the proposition, that a general average act cannot be done in respect of an interest which is in safety. To this rule however there are two important limitations, namely, those which are expressed in sections 3 and 15, and dwelt upon in the notes to those sections. The first of these is to the effect that a general average process instituted for the benefit of several interests may be incomplete, and continue to give rise to general average after one of those interests is in safety; the second lies in the necessity of distinguishing the execution of repairs rendered necessary by a general average act, which is the measure of a general average sacrifice, from that which is itself a general average act. It is to the failure to make this distinction that the dissenting judgment of Mr. Justice Manisty in *Atwood v. Sellar*⁶ is due.

A 'common danger' being essential to general average, the nature of that danger remains to be considered. Now though general average is an incident peculiar to a maritime adventure, the danger which is the occasion of the general average is not necessarily a sea peril. Thus for instance, according to Mr. Justice Montague Smith in *Walthev v. Mavrojani*⁷, and Chief Justice Campbell in *Job v. Langton*⁸, general average may arise from steps taken in order to preserve a perishable cargo safely landed on an island from destruction by decay. The danger must however be imminent though the property in danger may momentarily be safe, for as Chief Baron Kelly said in *Harrison v. Bank of Australasia*⁹, 'A certainty of destruction within a short time unless prevented is an emergency and imminent.'

Note to section 10. An unreasonable act is clearly unnecessary—*Price v. Noble*¹⁰; but besides this it is the duty of the shipmaster to accomplish the voyage so far as is possible by ordinary means: it is only where such means fail or are inadequate that an extraordinary act becomes necessary—*Wilson v. Bank of Victoria*¹¹; *Harrison v. Bank of Australasia*¹².

¹ 1 M. & S. 318, 14 R. R. 441.

² 19 Q. B. D. 362.

³ L. R. 4 Q. B. at p. 450.

⁴ 6 E. & B. 779.

⁵ 10 App. Cas. 404.

⁶ 4 Q. B. D. at p. 350.

⁷ L. R. 5 Ex. 125.

⁸ 6 E. & B. at p. 792.

⁹ L. R. 7 Ex. at p. 52.

¹⁰ 4 Taunt. 123, 13 R. R. 566.

¹¹ L. R. 2 Q. B. 203.

¹² L. R. 7 Ex. 39.

The authority for the subsection is to be found in *Lee v. Southern Insurance Co.*¹, an insurance case which would seem however to cover an analogous case in general average. The practice under York Antwerp Rules with regard to substituted expenses seems to go beyond what is justified by the decisions of the Courts, for as Mr. Justice Blackburn said in *Wilson v. Bank of Victoria*², 'Expenses actually incurred must be apportioned according to facts that actually happened.'

The Place of Adjustment.

11. The place at which claims arising from a general average act are required to be adjusted is called the place of adjustment.

The place of adjustment is the original destination of the ship unless both the following conditions are satisfied, namely, first that the voyage as a commercial undertaking is in fact terminated at the departing or some intermediate port; and secondly, either that the voyage is so terminated of necessity, or that the parties to the adventure consent to the adjustment being made at that place, in which case the place of adjustment is the place at which the voyage so terminates.

Note to section 11. It has never been disputed that in the absence of special conditions the original destination of the ship is the place of adjustment—*Simonds v. White*³. When a ship is chartered for a round voyage it would seem that the destination of the ship is the place of departure—*Williams v. London Assurance*⁴.

The question at what point a voyage actually terminates is one of fact. In *Hill v. Wilson*⁵, Mr. Justice Lindley decided that a ship sailing for Hull with some 2,000 tons of merchandise in fact terminated the voyage at Copenhagen, the ship having been compelled to put into that port, and having there disposed of all the cargo except 120 tons, with which, when repaired, she proceeded to Hull.

A voyage is terminated of necessity not only when it becomes physically impossible to continue it, but also when it becomes practically impossible to do so. 'A thing is practically impossible when it can only be done at an excessive or an unreasonable cost⁶.' 'It is the master's duty to repair the ship and proceed with the voyage if it can be done within a reasonable time and at a reasonable cost⁷, but where this is impossible the voyage terminates of necessity—*Mavro v. Ocean Marine*⁸.

It is to be remarked that one may consent to a voyage being terminated at an intermediate port without necessarily consenting to adjustment at that port—*Hill v. Wilson*⁹.

¹ L. R. 5 C. P. 397.

² L. R. 2 Q. B. at p. 212.

³ 2 B. & C. 805.

⁴ 1 M. & S. 318, 14 R. R. 441.

⁵ 4 C. P. D. 329.

⁶ *Moss v. Smith*, 9 C. B. 103.

⁷ Cockburn C.J., 10 C. P. at p. 416.

⁸ 10 C. P. 414.

⁹ 4 C. P. D. 329.

Estimation of the Amount of General Average.

12. The amount of a general average is to be determined according to sections 13 to 17.

13. All expense which is, and so far as it is, reasonably incurred in the course of doing a general average act is general average, provided that expense which would inevitably have been incurred even if the general average act had not been done is not general average.

14. Ordinary expense saved by the doing of a general average act is to be deducted from general average.

15. The cost including all incidental expenses of repairing or arresting damage, which within the meaning of section 16 is due to a general average act, is general average.

16. All injury to material substance directly or indirectly caused by a general average act is damage due to the general average act, provided that

(a) Damage or deterioration which will inevitably happen to property, whether any general average act be done or no, is deemed not to be due to the general average act.

(b) Damage or deterioration which could not reasonably be anticipated as following from the general average act, is deemed not to be due to the general average act.

17. The actual value at the place of adjustment, or destination if previously reached, of each of the interests in the adventure, that is to say of ship, stores, freight, and each shipment of cargo, is to be determined according to sections 21 to 24. The value which each of such interests would have had at that place if ship and cargo had arrived there at the time of actual arrival but without damage, loss, or repairs due to a general average act is also to be estimated.

In each case in which the estimated value exceeds the actual value the difference is general average.

In each case in which the actual value exceeds the estimated value, the difference is to be deducted from general average.

Note to section 13. In this code the view robustly stated by the Master of the Rolls in *Svensen v. Wallace*¹ has been adopted, namely, that 'The loss which arises in consequence of an expense is the expense itself.' Whence it follows that only those expenses which are incurred in the actual performance of a general average act are, as such, general average. Lord Justice Bowen, it is true, expressed an opinion that an expenditure may be general average though not itself a general average sacrifice if it is an expenditure

¹ 13 Q. B. D. at p. 73.

caused or rendered necessary by one¹; but it is believed that the substance of the Lord Justice's opinion is secured by section 3 of this code, according to which any series of acts which constitutes a single process is to be treated as a single act. For if it were possible that any expenses other than those incurred in a single general average process could be, within the meaning of the Lord Justice, caused or rendered necessary by a general average act, then surely among those expenses would be reckoned that of leaving a port, the entering of which has been a general average act. But inasmuch as Lord Justice Bowen decided² that such an expense was not general average, it follows that he restricted the meaning of his opinion by his decision, which decision in fact comes to this, that an expenditure may be general average, though not itself a general average sacrifice, if it is incurred in the course of a general average process. It may be that the Lord Justice used the expression 'Expenditure caused or rendered necessary by general average sacrifice³', meaning to include therein the cost of repairs occasioned by a general average sacrifice; but it seems better to consider the cost of repairs due to a general average act as the measure of the damage done by the act, rather than as an expense caused by the act, for in the latter view remote causes have to be considered. Thus in the case of a ship seeking a port of refuge in order to repair damage, the cost of leaving the port would not be 'caused or rendered necessary' by entering the port if the damage were particular average, whereas it would if the damage were general average. Mr. Justice Manisty felt the gravity of this difficulty and expressed it in his judgment in *Atwood v. Sellar*⁴.

The House of Lords decided in *Anderson v. Ocean S.S. Co.*⁵ that any party has a right to submit to a jury the questions not only whether it has been reasonable that money should be expended for a general average purpose, but also whether the amount of such expenditure has been reasonable.

The proviso as to expenses which inevitably would have been incurred is based on analogy to the case of *Shepherd v. Kottgen*⁶. Mr. Justice Manisty moreover, in *Atwood v. Sellar*⁴, pointed out that if a ship while in course of bearing up for a port of refuge sustains general average damage, the contribution to the expense of entering and quitting the port of refuge cannot be affected by the happening of such damage.

Note to section 14. Thus in *Plummer v. Wildman*⁷, where, whatever Lord Ellenborough may say to the contrary, it was in fact decided, though in the light of subsequent decisions wrongly decided, that in the circumstances of that case repairing a ship in order to remove the incapacity for prosecuting the voyage was a general average act occasioning general average expense, Lord Ellenborough expressed his opinion that 'if any benefit *ultra* the

¹ 13 Q. B. D. at p. 85.

² In *Soendsen v. Wallace*.

³ 13 Q. B. D. at p. 85.

⁴ 4 Q. B. D. at pp. 351, 352.

⁵ 10 App. Cas. 107.

⁶ 2 C. P. D. 585.

⁷ 3 M. & S. 482, 16 R. R. 334.

mere removal of this incapacity should have accrued to the ship by the repairs done, inasmuch as that will redound to the particular benefit of the shipowner only, it will not come under the head of general average.

Note to section 15. The judgments in *Atwood v. Sellar*¹, both in the Queen's Bench Division and also in the Court of Appeal, have been subjected to much judicial criticism; but the decision not only stands undisputed, but has met with approval in the House of Lords². *Atwood v. Sellar*¹ decides that where a ship damaged by a general average act enters a port of refuge to repair such damage, then not only the cost of such repairs, but also the expenses incurred in entering and leaving the port, as well as the expense of unshipping, warehousing, and reshipping the cargo are general average. Lord Justice Thesiger, moreover, expressed his opinion that the wages and provisioning of master and crew during the repairs are also general average³, and quoted with approval from Abbott on Shipping that 'If the damage to be repaired be in itself an object of contribution, it seems reasonable that all expenses necessary, although collateral to the reparation, should also be objects of contribution; the accessory should follow the nature of its principal.' Thus the cost of raising funds to pay for such repairs should also be included in general average.

The expense of arresting and repairing damage done to cargo by a general average act falls under the same head; for instance, the expense of unloading, drying, and reloading goods damaged by water used to extinguish fire.

Note to section 16. Repairs are expressly limited to repairs of damage done to material substance in order to make it clear that expenses otherwise occasioned cannot be admitted as general average by being treated as the cost of repairs.

- (a) *Shepherd v. Kottgen*⁴ decides that there is no sacrifice of, and therefore no contribution to the loss of property which is already doomed to destruction. Whether any particular property is or is not doomed to destruction is a question of fact to be decided by the circumstances of each case. Thus Mr. Justice Willes, in *Johnson v. Chapman*⁵, said, 'A lawyer could not lay down as a matter of pure law that all lumber cut away is wreck.'

Property which may be saved by the doing of a general average act is not doomed to destruction.

By extending the principle of *Shepherd v. Kottgen*⁴ from the case of complete destruction to that of partial damage, the difficult and hitherto undecided problem occasioned by voluntary stranding finds its solution. Voluntary stranding gives rise to general average with the proviso that damage done by the voluntary stranding is not

¹ 4 Q. B. D. 342; 5 Q. B. D. 286.

² 5 Q. B. D. at p. 291.

³ 10 App. Cas. at p. 420.

⁴ 2 C. P. D. 585.

⁵ 19 C. B. N. S. at p. 582.

general average, so far as it can be proved by the person resisting contribution that the injury resulting from the voluntary stranding would inevitably have happened to the property damaged whether the ship had been voluntarily stranded or no.

- (b) Thus damage done to a ship by collision with jettisoned goods or wreck cut away is not general average. The rule is of course part of the general law as to the measure of damages—*Hadley v. Baxendale*¹.

Note to section 17. Thus Chief Justice Bovill in *Fletcher v. Alexander*² says, 'The rules as to contribution and adjustment seem to me to depend on the probable state of things at, and to have reference to the time and place where adjustment ought to take place.'

In estimating the value which cargo would have had at the place of adjustment or at its destination, if it is to be delivered at an intermediate port, the condition of similar cargo which has been undamaged by the general average act is very material evidence.

Complete empirical regulations are to be found in the York Antwerp Rule XIII, for estimating the value which a ship would have had if she had not been damaged and repaired.

Persons liable to contribute to General Average.

18. Each person having at the time of the happening of a general average act an interest in the adventure as defined by section 8, must contribute to the general average arising from an act done for the benefit of such interest.

Note to section 18. A person other than the owner at the time of the loss may become liable to contribute to general average by contract—*Scaife v. Tobin*³. All the questions of difficulty arising under this section are dealt with in the note to section 8.

Method and Amount of Contribution.

19. Each of the persons specified in section 18 must contribute in respect of each of those interests specified in section 8, for the benefit of which the general average act has been done, a sum which bears to the general average the same proportion which the value of such his interest bears to the aggregate value of all such interests.

The payment of such contribution must be made to the person on whom the general average loss immediately falls.

20. The value of an interest in an adventure is estimated as its value at the termination of the voyage, together with the amount to be made good in general average, less expenses

¹ 9 Ex. 341.

² L. R. 3 C. P. at p. 383.

³ 3 B. & Ad. 523.

other than general average incurred in respect of that interest subsequent to the happening of the general average act.

21. The value of the ship at the termination of the voyage is the sum for which the owner if reasonable would be willing to sell it, together with its equipment, stores, and unused provisions at the time and place of the termination of the voyage irrespective of its engagements.

22. The value of the cargo at the termination of the voyage is its market value at the time and place of delivery from the ship.

23. The value at the termination of the voyage of advance freight is the amount of advance freight paid in respect of goods which have in consideration of the payment of such advance freight been delivered at their destination.

24. The value at the termination of the voyage of freight other than advance freight is the gross amount of such freight payable by the shippers of goods in respect of the carriage of goods carried on the voyage.

Note to section 20. See *Fletcher v. Alexander*¹.

Note to section 21. See *African S.S. Co. v. Swanzy*²; *Grainger v. Martin*³.

Note to section 22. See *Fletcher v. Alexander*¹.

Note to section 23. See *Trayes v. Worms*⁴.

Limitations on the right to claim and on the liability to pay Contribution to General Average.

25. Where a general average act has become necessary owing to the negligence of any party, or owing to the negligence of those for whom he is responsible, that party is not entitled to claim contribution, but is primarily liable to make good the loss.

Subsection. Cargo stowed on deck is for the purposes of this section deemed to be negligently stowed unless such stowage is customary in the particular trade, or unless all parties to the adventure agree to its being so stowed.

26. There is no right to claim nor liability to pay general average in respect of the lives or limbs of freemen, nor in respect of cargo other than that put on board for the purpose of commerce.

27. Where expense has been incurred in order to accomplish some end by means of a general average act, no party can be called upon to contribute in respect of his interest a greater sum

¹ L. R. 3 C. P. 375.

³ 4 B. & S. 9.

² 2 K. & J. 660.

⁴ 19 C. B. N. S. 159.

than that for which the end in question might have been accomplished so far as his interest was concerned.

Note to section 25. This is quite clear. See *Robinson v. Price*¹; *Johnson v. Chapman*². A party is not precluded from claiming contribution by the negligence of his servants if he is not responsible for their negligence—*The Carron Park*³.

General average remains general average in spite of the primary liability of the negligent party to make good the loss—*Strang v. Scott*⁴.

Note to sub-section. See *Johnson v. Chapman*²; *Wright v. Marwood*⁵; *Strang v. Scott*⁴.

Note to section 26. See *Brown v. Stapylton*⁶.

Note to section 27. See the judgment of Mr. Justice Blackburn in *Kemp v. Halliday*⁷.

The effect of Contract and Custom in regard to General Average.

28. The provisions of this code are subject to the effect of expressed contract.

29. There is a presumption that the customs of British average adjusters are in conformity with this code.

Note to section 28. Although there are many obiter dicta to the contrary, it is abundantly clear that the opinion expressed by Lord Esher in *Burton v. English*⁸ is right, and that the obligation to pay general average is quasi-contractual and not contractual—*Burton v. English*⁸, *Crooks v. Allan*⁹, *Schmidt v. Royal Mail Co.*¹⁰; this obligation cannot therefore be governed by the implied intentions of the parties. It is however clearly competent to the parties to enter upon any express contract in relation to general average—*Stewart v. West India Pacific*¹¹.

Note to section 29. According to Lord Blackburn as he expressed himself in *Svensen v. Wallace*¹², and according to the whole current of English authorities, it is clear that the custom of adjusters has no greater force than to raise a presumption in favour of the legality of the usage.

Means of enforcing Payment of Contribution to General Average.

30. Every person entitled to contribution to general average may enforce payment thereof by a direct action brought against each person liable to contribute thereto.

¹ 2 Q. B. D. 91, 295.

² 15 F. D. 203.

³ 4 Bing. 119.

⁴ 5 Q. B. D. 38.

⁵ 10 App. Cas. at p. 416.

⁶ 14 App. Cas. 601.

⁷ L. R. 1 Q. B. 520.

⁸ 45 L. J. Q. B. 646.

⁹ 19 C. B. N. S. 563.

¹⁰ 7 Q. B. D. 62.

¹¹ 12 Q. B. D. 218.

¹² L. R. 8 Q. B. 88, 362.

31. The shipowner has moreover a lien on all cargo whose owner is liable to contribute to general average, and can require before he parts with it reasonable security for the payment of contribution.

32. Every person entitled to contribution may bring an action against the shipmaster if he should fail to exercise his lien on the cargo, or take other necessary steps for the adjustment of average and the security of its payment.

Note to section 30. See *Dobson v. Wilson*¹.

Note to section 31. See *Crooks v. Allan*². The cargo owner is bound to offer reasonable security, and the master cannot require unreasonable security before parting with the cargo—*Huth v. Lamport*³, *Strang v. Scott*⁴.

Note to section 32. See *Crooks v. Allan*², and *Strang v. Scott*⁴. It does not however follow that an injunction can be claimed to restrain a shipmaster from parting with cargo which is liable to contribute to general average—*Hallett v. Bousfield*⁵.

In the absence of special contract general average is adjusted according to the law of the place of adjustment—*Simonds v. White*⁶, *Lloyd v. Guilbert*⁷. Hence it follows that this code is intended to apply only to those cases in which the law of the place of adjustment is English law.

H. C. DOWDALL.

P.S.—The effect of section 7 is supported by the judgment of Sir Francis Jeune in the *Bona*, reported in the Times for November 14, 1894. In that case a ship grounded, and the engines were driven ahead and astern in order to get her off. It might conceivably have been held that the engines, though used with an extraordinary motive, were used for the purpose for which they were intended, namely, as the propelling power of the ship, and if this view had been taken judgment would no doubt have been given for the defendants; but it was in fact held that the engines were used for a purpose for which they were not intended, so that the damage done to them by such use was general average. The expenditure of coal in driving the engines was also held to be general average, as forming part of the general average act of abusing the engines. Such expenditure might also have been held to be general average, because the contractual liability of the shipowner under the contract of affreightment was put an end to by the stranding of the vessel, and the coals were supplied by him under his mixed liability as bailee of the goods and *negotiorum gestor*.

H. C. D.

¹ 3 Camp. 480, 14 R. R. 817.

² 5 Q. B. D. 38.

³ 16 Q. B. D. 442, 735.

⁴ 14 App. Cas. 601.

⁵ 18 Ves. 187, 11 R. R. 184.

⁶ 2 B. & C. 805.

⁷ L. R. 1 Q. B. 115.

A SPANISH VIEW OF BENTHAM'S SPANISH INFLUENCE.

IN April last, Don Luis Silvela, who has been prominent for many years as a Professor of Criminal Law in the University of Madrid, was received as a member of the Spanish Royal Academy of Moral and Political Sciences. He succeeded Don Alonzo Martinez, a man of letters, a jurist, and a statesman, who has left his mark on the Spanish Constitution of 1876, and on that portion of the Spanish Civil Code which deals with the law of Marriage. The official discourse which Señor Silvela delivered on the occasion of his public reception as an Academician has since been printed in a quarto pamphlet of some ninety pages. It is full of special interest for English jurists, even independently of its graceful literary skill and its facile grasp of jural philosophy. For it is an attempt to portray and criticize, partly by the help of documents hitherto unpublished, the influence exercised by our countryman Bentham upon lawyers and politicians in Spain, during the two periods in his lifetime when a temporary revival of Parliamentary institutions gave Spain a brief space of legislative activity and intellectual freedom.

The first of these Parliamentary periods belongs to the four years' struggle (1808-12) against the kingship of Joseph Bonaparte. It produced the famous Constitution, drafted in 1811 at Cadiz whilst French shells were exploding under the draftsmen's window, and adopted in March 1812; which is the starting-point of modern Spanish politics, and was at once accepted in all the countries of Southern Europe as the ideal of their Liberalism. But this first period ended in May 1814, when Ferdinand overthrew that Constitution, restoring unlimited monarchy, and along with it the monasteries, the Inquisition, and the exemptions of the clergy and nobility from taxation. To get rid of the Liberal officers in the army, commands were ultimately assigned to them in a force destined for South America to subjugate the colonies that had renounced allegiance to the monarch. But in this very force, when assembled at Cadiz for embarkation to Buenos Ayres, General Riego, in January 1820, successfully raised the standard of insurrection. So strong did the insurgents show themselves throughout Spain, that within two months the king restored the Constitution,

and the second Parliamentary epoch began. This revolution kindled a similar fire in Portugal, Sardinia, and Naples, each of which proceeded to proclaim a Constitution copied from the Spanish one. Even in Spain itself, however, the nation was so far from unanimity that civil war seemed imminent; and in October, 1822, the Holy Alliance, from its Congress at Verona, called upon the Cortes to alter the Constitution by enlarging the powers of the king. On their refusal, the French army marched across the Pyrenees and chased the Cortes to Cadiz. There it abdicated its powers in August, 1823; and the second period of Spanish Parliamentary history was brought to an end.

These years, 1820-23, are in the life of Jeremy Bentham what 1808-13 are in English military annals—the great Peninsular period. His writings obtained for some time a greater celebrity in Spain and Portugal than anywhere else in Europe, rivalling indeed the celebrity which at a much later date they won in England itself.

For though Bentham was a native of London, his fame only reached England after a somewhat circuitous journey over the Continent. Paradoxical as this may seem, it is sufficiently evidenced by the fact that the works which chiefly won him his fame are those which first appeared, not in English but in French, and not from his own pen but from that of Etienne Dumont. A collected edition of these was published in 1829, at Brussels, and a still more complete one appeared there in 1840; but in England no complete edition was printed until 1843, ten years after Bentham's death. And the paradox can readily be explained. Jeremy Bentham was not a truly English jurist. His writings, and still more his opinions, were always somewhat repellant to typical Englishmen; he was at heart a disciple of the French Encyclopaedists of the eighteenth century. It was only when the nations of the Continent had done homage to the fertility and originality of his intellect that he came to command any general attention in England.

Bentham was born in London in 1748, and his home was principally there until his death in the year 1832. But though educated thus far away from the scene where the philosophers of France were busy in developing the ideas which culminated in the dramatic changes of the Revolution, and though trained for the quiet career of an English lawyer, he soon fell under the influence of the Encyclopaedist philosophy. Hardly had he begun to exercise his profession, when he abruptly flung it aside; disgusted by the subtleties, technicalities, and fictions of the English law of his time. In the fulness of his contempt for it he proceeded to

devote himself to its examination with the same audacious and irreverent spirit towards all that was currently respected or accepted, which characterized the Encyclopaedists. Like them, he tried everything by an infallible touchstone of his own, and from the altitude of his individual judgment pronounced everything that did not satisfy his taste to be irrational and unworthy of acceptance by any man whose eyes were not blinded by fanaticism. Like them, he was fonder of drawing logical inferences than of tracing historical causation, and by help of a purely abstract criterion of merit he undertook to pass judgment on the institutions of countries with which he had scarcely any acquaintance. And, like them, he delighted to mix himself in the current affairs of foreign nations, believing sincerely that a constitution good for Europe would require very slight modifications to make it applicable to Asia. Hence, in confident reliance on the efficacy of his infallible theories of jurisprudence, he was quick to offer his advice, often entirely unsought, to any nations disturbed by political convulsions, like the United States, Switzerland, Turkey, France, Portugal, and Spain. In this cosmopolitan enthusiasm the affairs of Spain came naturally to have a special attraction for him during the three years of Parliamentary government that followed the Revolution of 1820, when a nation seemed to be born in a day, and a people who had been regarded in December as ignorant slaves, became in April the advanced guard of European Liberalism. The activity of the nascent Spanish Cortes made it possible to hope for rapid and drastic legal reforms; so Bentham strove hard to bring himself before the mind of Spain.

Within five weeks from the king's acceptance of the restored Constitution, Bentham rushed into Spanish politics. On April 14, 1820, he wrote in the *Morning Chronicle*, as 'the most efficient channel for communication,' an appeal to Spain to relax the stringent language of the new oath of allegiance to the Constitution. In a few weeks more, he sent to the Cortes itself a present of his collected writings, and set to work composing pamphlets for translation into Spanish. One of them, 'Letters to the Spanish People upon the Liberty of the Press,' never reached the addressees; for the journalist Mora, who was to translate it, was thrown into prison for a political offence before his translation was finished. Bentham was more successful with his subsequent pamphlets upon Spanish affairs.

Of these, one relates to the Revolution itself, being concerned with the final collision between the people and the king's troops. When, in 1820, the movement for a restoration of the Constitution began, Cadiz, whose maritime situation has always rendered her

readily accessible to foreign, and consequently to Liberal, influences, was (as Byron describes her, and as 1868 again found her,) 'first to be free, as last to be subdued,' and her streets became at once the scene of great popular excitement. The 10th of March had been fixed, with the apparent acquiescence of the local military authorities, for the public proclamation, in the main square of the city, of the Constitution of 1812. But on that morning, just as the ceremony of proclamation was beginning, the military authorities, suddenly reversing their policy of non-interference, poured their troops into the crowded square, scattered destruction and death amongst the unarmed and astonished throng, killing upwards of 300 persons and wounding 1,000, and then surrendered the city for two days to the unrestrained passions of the soldiery. They little knew that at Madrid the king had already resolved to yield to the widespread demand of the nation; and that on that very 10th of March he was issuing a manifesto to the Spanish nation which concluded with words that became famous: 'Let us go forward boldly in the paths of the Constitution, and I myself will lead you.' When the track of revolution had been converted thus abruptly into the king's highway, there naturally arose at once a violent outcry for the prosecution of the military authorities of Cadiz, for having dealt so harshly with unfortunate citizens, whose only crime was that of going forward boldly in the paths of the Constitution four or five hours earlier than their king. A prosecution before a military court was accordingly ordered, and Colonel Hermosa was appointed to act as Public Prosecutor. But months and even years passed by without the prosecution being brought to any practical result; in spite of repeated complaints in the Cortes, and an emphatic declaration there by one Deputy O'Daly that 'heaven and earth were eager' for the prompt and exemplary punishment of the accused officials. On August 29, 1820, for example, one of these repeated complaints of the slowness of the prosecution was being made when, in reply to it, a letter was read from Colonel Hermosa, the official prosecutor. After explaining how great a mass of evidence it had been necessary to accumulate, he concluded with words which are noteworthy, not for their own novelty, but because they provoked the indignation of the irascible Bentham: 'I must remind the public that in judicial proceedings, deliberateness is a tribute due to justice; and that judicial forms are shields of our liberty; whilst hastiness is the greatest of perils for a judge.' These words, and a few others equally commonplace, were all that came to the ears of Bentham; but they sufficed to put his pen into action. The 'Peterloo massacre' of the Manchester reformers, the year previously, was still fresh in his memory; and he grudged seeing a

second armed force receive 'the same immunity (though not the same triumph or the same rewards)' as the Lancashire Yeomanry regiment.

One might have thought that a citizen of the world, who was taking upon himself to advise the Spanish nation with reference to its immediate political duties, would first of all have looked closely into the events of that fatal 10th of March in Cadiz, the condition of widespread discontent which they disclosed, and the evident hostility between the Spanish king's troops and the Spanish people, omens of very evil import for the constitutional régime which the Cortes was endeavouring to establish. But, far from this, Bentham contented himself with fastening upon the hackneyed phrases in Colonel Hermosa's commonplace letter, and proceeded to minutely examine in separate paragraphs, as if he were analyzing some formal academical thesis, whether or not judicial deliberateness is a tribute due to justice, and whether or not judicial forms are shields of our liberty, and whether or not hastiness is the greatest of perils for a judge. None the less it may be frankly admitted that Bentham's protest against forensic delays derived some corroboration from the issue of this great State Trial, which, after fifty-four offenders had been indicted, and some seven thousand pages of evidence had been taken, dragged itself on for more than three years, and finally terminated in handing over to punishment one solitary sentinel, who was in no way more guilty than his fifty-three fellow-prisoners;—a lame and impotent conclusion for the avenging zeal of the deputies of Cadiz and the vigorous intentions of the Cortes.

Another of Bentham's pamphlets on Spanish politics consists of a Letter to the Portuguese nation on the defects in the Spanish Constitution of 1812. That Constitution was so much admired in the south of Europe, that it had recently been adopted with enthusiasm at Naples (though at the moment when it was adopted there was not, according to Lord Brougham's informants, a single copy of it to be found in the whole city). And in Portugal the leaders of the insurrectionary movement, which broke out in October 1820, had taken an oath of fidelity to its rules. The Cortes of Portugal met in January 1821, and Bentham at once sent them a present of his works; which, on April 13, they accepted gratefully, and ordered to be translated and printed at the public expense. At this time their chief business was the drafting of a Constitution for Portugal on the basis of that of Spain. Bentham forthwith despatched to them this Letter, in which he explains the four defects that seemed to him to mar the Spanish Constitution; though he was anxious that they should

lose no time in adopting it, as soon as they had removed from it these blemishes.

The first defect is described by him as being that of an immutability which supposes infallibility on the part of the legislators. The charge is somewhat exaggerated, for a critic who prided himself so strongly as did Bentham upon his methodical precision; inasmuch as the supposed immutability and legislative infallibility were, by his own admission, limited to the brief period of nine years. Moreover, Bentham somewhat unfairly overlooked the fact that this nine years of stability was not guaranteed to all the enactments of the legislature, but only to the actual Constitution itself. For a document of such supreme importance, eight years of stability scarcely seems excessive; certainly not in Spain, whose repeated constitutional changes have vividly shown the evil of rapid fluctuations in a nation's fundamental laws. Fully two years after this, Brougham could exclaim in the House of Commons, 'The Spaniards have not changed one word of their Constitution of 1812; and God forbid that they should change a letter of it, so long as they have the bayonet of a foreign soldier at their breast!'

With a greater justice, Bentham points out as a second defect the singular rule which precluded deputies who had sat in one Cortes from being elected to the next one. At a later period, however, Bowring's stories of the demoralizing effect which a Parliamentary seat produced upon Spanish politicians, led Bentham to recant his condemnation of this rule; and in his 'Constitutional Code' he abolishes re-eligibility. His biographer notes this as one of the only two occasions of importance on which Bentham is ever known to have changed his mind. Another point in the Spanish Constitution which Bentham censures is what he calls 'the sleep-compelling rule,' by which the Cortes could never remain in session for longer than four months at a time; a rule whose defects would, however, in our own day, be perhaps compensated by its tendency to concentrate upon active business the Parliamentary energy which is somewhat apt to lose itself in diffuse loquacity. The fourth and final defect which Bentham points out is the biennial duration of the Cortes. He thinks two years too long a period; and he supposes it only justifiable in Spain by the necessity of admitting deputies from the South American colonies, an inconvenient necessity which he soon had the pleasure of seeing Portugal delivered from by Brazil's declaration of Independence. Possibly the electors of our own day, with their experience of the inconvenience of repeated visits to the polling-booth, will think that biennial Parliaments would be not too long but much too short.

This Letter was formally read aloud in the Portuguese Cortes on June 29, 1821, and received much approval. But though the patriarch of Utilitarian politics, usually an acute critic of all the works of other men, could not discover in the Constitution of 1812 any defects beyond these four, there certainly must have been others, and weightier ones. For even when purged of these four errors, the Portuguese Constitution collapsed just as promptly as the unpurged one from which it was copied. The approving verdicts of political theorists seem to be no trustworthy test of the stability of a ship of state; for, as Señor Silvela well says, our experience of the rapid fall of the Constitution of 1812 in Spain, of 1822 in Portugal, and of other Constitutions in both countries in later years, gives painful proof of the fact that paper Constitutions are easily blown away by the wind.

A further pamphlet on Spanish politics is a Letter addressed to the people of Spain upon the proposed establishment of a Second Chamber. It belongs to the year 1820. 'I must humbly confess,' says Señor Silvela, 'that in the constitutional history of my country, I cannot find any trace of any proposal having ever been brought before the Cortes for any such purpose. And I may certainly say, with very little fear of contradiction, that as a mere problem of abstract scientific theory the question of a Second Chamber certainly did not trouble the minds of Spaniards at that time. No doubt at an earlier period in 1811, when the Constitution of Cadiz was being drafted, the question had been debated at some length whether or not the Cortes should consist, in the mediaeval fashion, of separate Estates. But, even then, no one suggested the possibility of organizing any of those Estates into a Chamber like the English House of Lords, based upon hereditary right and incapable of constitutional dissolution. Moreover, the Constitution elaborated in 1811 was restored in its full integrity on the revival of liberty in 1820. That second Parliamentary epoch began with the cry of "The Constitution for ever," and was maintained with the war-cry of "The Constitution or death;" and when the Parliament was put down by the intervention of the Holy Alliance, it died whilst enacting special legislation for securing the integrity of this "Sacred Constitution" (as the phrase then ran). Yet, to assure myself that no project of introducing a Second Chamber was then entertained, I have carefully examined the proceedings of the Cortes from 1820 to 1823 to see if any alteration was proposed in the Constitution. As might be expected, there was none. Not even in the dying throes of the Parliament, when the French army was already at Madrid to extinguish it, did the Cortes or the Liberals deem it possible to think of altering

a single comma of the Constitution of Cadiz. Hence not the slightest trace could be discovered of that supposed proposal to establish an Upper House, which provoked Bentham into writing this Letter to the people of Spain.'

Yet to Spain undoubtedly the Letter is addressed. It begins with these words, 'Men of Madrid, members of the Cortes, people of Spain! If the old man who thus addresses you is an intruder, listen to him with indulgence, he is not a spontaneous one. He would not have spoken had he not been called.' There can be no doubt then that this Letter is addressed to Spain herself and especially to her legislators; and that it was written by Bentham not officiously but at the request of some one who played a part in public affairs. Who was this person? The question is answered in the Brussels edition of Bentham's works by the historical preface, probably from Dumont's own pen, which is prefixed to this Letter. This preface says, 'As the question of the necessity of an Upper House was being discussed in Spain, a distinguished Spaniard, Señor Figueira, sent Bentham a letter in which he earnestly begged him to give his opinion on this important point and to throw the weight of his name and his pen on the side of reason, justice, and democracy. This invitation from Figueira gave rise to the following essay; which, as soon as it reached Madrid, was translated into Spanish by the same pen which had asked for it.' But here arises a curious historical doubt. 'To my surprise,' says Señor Silvela, 'when I came to inquire into the matter, I discovered that in neither of the two elections which took place in the 1820-23 period was any one of the name of Figueira returned to the Legislature; and indeed that there is no ground for supposing that any Spanish politician of that name existed. But singularly enough in the neighbouring kingdom of Portugal a person of almost identical name, and an actual correspondent of Bentham's, Juan Bautista Figueiras, was then playing a prominent part as a member, and even as a Secretary, of the Cortes of Portugal.' And he adds that to Portugal 'not only the name of Bentham's correspondent, but also the very subject of Bentham's Letter, seems to point. For though in Spain the question of an Upper Chamber was never raised in the second Parliamentary period when Bentham's Letter was written, yet the case was wholly different across the Portuguese frontier. There, in the debates of the Cortes upon the outlines for the new Constitution, some eminent orators, like De Araujo and Da Silva, maintained the importance of two Houses; whilst others, headed by the celebrated Borges Carneiro, preferred a single Chamber. This latter party, when the point came to be voted upon, secured

for the establishment of a single Chamber a majority of fifty-nine to twenty-six. Bentham's influence at that time was even higher amongst the Liberals of Portugal than amongst those of Spain. He had presented his writings to the Cortes of both countries; and the Portuguese recipients of the gift, unlike the Spanish, had ordered them to be translated at the expense of the State. Hence it would be natural enough if during the heat of the discussion of so important a constitutional point as Bicameralism, some Portuguese statesman should have thought it worth while to secure for his party the support of the authority of the great English philosopher.' But plausible as this conjecture of Señor Silvela's may be, it can hardly stand against the words of the Letter itself, which Bentham evidently addresses to Spain and not to Portugal, and against Bentham's own statement (in the London edition of the Letter) that, as soon as it had been translated into Spanish, some deputies of high rank at Madrid thought it so important as to propose that it should be formally read at a public sitting of the Cortes. Bentham adds that this reading actually took place, and amidst 'abundant and all but unanimous applause'; but Señor Silvela avers that 'the extant records of the Spanish Cortes make no mention of any such proceeding, or of any proposition on the subject.' It is possible, though unlikely, that Bentham was mistaken as to the Letter having been read to the Cortes. And it is clear that his Brussels editor was mistaken in supposing that the person who invited and translated the Letter was any (real or imaginary) Señor Falguiera; for Bentham himself says in the preface to the English version (and the title-page of the Spanish version corroborates him), that this person was J. J. de Mora, an advocate who edited *El Constitucional*, then the chief daily paper of Madrid. But, at the same time, Mora's preface disproves Señor Silvela's impression that the question of introducing a Second Chamber was not then being mooted in Spain; for he complains of 'the imprudent and ill-informed zeal which desires it.' And Bentham's friend Blanquiere, who was residing in Madrid when Mora's translation appeared, gives in his 'History of the Revolution in Spain' a clear account of the appeal from Spain to Bentham, and of the effect produced by the Letter. And Bowring, who was taking an active interest in Spanish politics, testifies (Bentham's Works, X. 516) that a 'desire for hereditary legislators' was arising in Spain in 1820; and attributes it to the influence of some of the refugees who were then returning from England, full of admiration for English institutions—a tribute to the House of Lords from an unexpected quarter. Señor Silvela is mistaken in supposing that there is any suggestion that the question was

ever discussed in the Cortes. All that even the Brussels editor alleges is merely that one Señor F. J. Reynoso stood for election as a deputy for the province of Seville just after writing a book in which he had recommended Spain to adopt a Second Chamber—stimulated to this recommendation, Bentham hints, by the hospitalities of Holland House—and thus his election came to turn upon this particular question. Reynoso's candidature and policy were actively supported by Riego, the hero of the Revolution of 1820; but in spite of this endorsement the electors decided against him. Bentham modestly hints that their decision was due to his Letter having appeared in Spain before the election was over. Reynoso's desire seems to have been for a Chamber of representative nobles, elected by their fellows. That the Chamber could only be representative, was rendered inevitable by the multiplicity of the Spanish nobles; who in 1788 had numbered 478,716, and by 1820 had become more numerous still (Blanquiere, p. 459). But there were two fatal obstacles to the scheme. One was the local inequality in the distribution of these nobles throughout Spain; some provinces having hardly any, whilst in Biscay and Asturias one person in every three had a title of honour. The other was the disrepute into which the whole order was falling; in the Cortes of 1813 there had been only three deputies who were not nobles, but in that of 1821 only one of the European deputies was a noble, the Conde de Toreno who became its President.

So far as concerns the contents of Bentham's Letter on this subject, it discusses nothing more than the limited and somewhat inappropriate question of the desirability of an Upper Chamber constituted exactly like the English House of Lords; with the same hereditary origin, the same powers, and, consequently, the same defects. Bentham therefore afforded no help on the question of the wisdom of reviving the two ancient Estates of ecclesiastical and civil dignitaries, which had been debated at Cadiz in 1811; nor on the question which Portugal was discussing in 1820, of the propriety of establishing two representative Chambers which, though alike based upon popular election, should vary in the qualifications required both for the electors and for their representatives; nor on the still more immediate question of the desirability of representing in one Chamber the people at large, and in a second Chamber the guilds and other corporate associations of national importance. Bentham merely applied himself to this bare question—'Shall we add to the assembly which the majority of the citizens have elected and which the majority of citizens can dissolve, another assembly which that majority has done nothing to elect, and which no constitutional power can dissolve?' When

the problem is stated in this extreme form, Bentham of course needs no further arguments than those which can be employed against the British House of Peers. The cosmopolitan philosopher, whom the Cortes of Portugal had enthusiastically entitled 'The Citizen of the World,' did not really utter this oracle of his for the world at large, nor even for the Spaniards to whom he seems to address it, nor even for the Portuguese who may have needed it, but simply for his fellow-citizens of the United Kingdom of Great Britain and Ireland. Bentham's Letter to Madrid belongs (as Señor Silvela says) to the homeward mail.

Bentham had written philosophically on the influence which differences of place and time should have in modifying the work of legislation; and had formulated consequent rules for adapting the laws of one nation to the circumstances of another. Yet, as we have seen, he rushed into Spanish politics with a thorough ignorance of the country to which he was offering his advice, completely forgetting that the first duty of a political writer is to take account of those local circumstances which must modify the application of his abstract theories. The same defect reappears in his second set of Spanish Essays, the seven Letters to the Conde de Toreno on the Draft Penal Code.

In August 1820 the Spanish Cortes had appointed a committee to frame a code of Criminal Law; and the task was prosecuted so energetically that in April of the following year the committee submitted a full draft of their proposals. In spite of the excitement of that revolutionary time, of the absence of any preparatory outlines for them to work upon, and of the profound change which, during the generation then living, had passed over the current European theories of penal jurisprudence, the committee had succeeded in producing in these eight months a code which Señor Silvela pronounces to have been 'certainly not inferior to any that were then in existence, and perhaps superior in some important points to the present Spanish laws.' The committee proposed that the Government should send copies of this Draft to all the Universities, legal corporations, and judicial functionaries of Spain, for the benefit of their criticisms; and should issue a public notice inviting all competent scholars to send in criticisms of their own. The proposal was adopted; and August 15, 1821, was appointed as the last day for sending in these comments. The critics proved to be as quick at literary work as the committee itself; so that by the autumn of 1821 suggestions had been sent in from ten courts of law, twelve Universities, and a variety of other public bodies, amongst which we may especially mention the Barcelona Association of Druggists. Unfortunately most of these memorials are now

lost; having been entrusted in 1836 to a subsequent commission on Criminal Law, whose secretary gave a receipt for them which is still to be seen in the office of the Ministry of Justice at Madrid, though every other clue to their whereabouts has long been lost. Had they been preserved, they would have constituted a very valuable picture of the views current in those times upon criminal jurisprudence; a summary of the prevalent opinions of men of learning and men of practice, which would have constituted an almost unique memorial of a noteworthy period in Spanish legal history.

When, in the spring of 1821, the Government had appealed to all competent scholars to add their quota to these criticisms, no special appeal seems to have been sent to Bentham; in spite of the thanks which the Cortes had voted him in the previous October 'for his readiness to co-operate in consolidating the Constitutional system' and of a proposal which he thereupon had made to draft them a complete body of laws for Spain. But, about a week before the expiration of the time for sending in criticisms to the committee, it occurred to the Conde de Toreno, who was then President of the Cortes, and 'perhaps the most influential man in all Spain,' that Bentham, whom he had pronounced to be 'the luminary of legislation and the benefactor of mankind,' would probably be able to throw some new and important light upon the Code. On August 6, 1821, he accordingly wrote to Bentham from Paris, where he was staying, and sent a copy of the Draft Code for his perusal. Bentham answered by seven copious letters; the first of them dated on September 11, the last of them on November 7. Before the former of those days the committee had of course finished receiving, and before the latter they had even sent in their report upon, the comments of their various corporate and unincorporate critics. They do not name Bentham in the list of those from whom they had received criticisms. Indeed Toreno's letter, asking for Bentham's views, shows plainly that he applied for them with no idea of their being submitted to the committee or even being put into print, but only in hopes that he himself might be able to make use of them 'in the discussion' which would take place in the approaching winter session of the Cortes. In fact, he was proposing to do for Bentham at Madrid precisely what Brougham habitually did for him at St. Stephen's.

By an ill-fortune, akin to that which swept away the bulk of the work of the other critics of the committee, the manuscript letters of Bentham are not now to be found amongst the papers which the Conde de Toreno bequeathed to his family. Señor Silvela adds that he has not been able to find any translation

of them into Spanish, or any trace of their having attracted any attention in Spain or having even been quoted in the Cortes when the Draft Code was discussed. Bentham, however, published them in England in the following year.

When Toreno thus addressed himself to the Englishman who had just made a modest offer to draft all the Codes which the Spanish nation might need, he may have had a suspicion that, if a legislator of such excessive ambition did condescend to accept the humbler office of a mere reviewer, his review would probably be neither very complimentary nor very useful. Nor was it. Bentham, in fact, in his very first Letter, almost entirely ignored the draft that had been submitted to him; and he dwelt upon the difficulty of giving any final advice to the Spanish jurists until he had completed a great work on which he had already been occupied for many years, and which was to embrace a complete view of the whole field of legislation and to be subdivided into eleven parts, whose titles and topics he proceeded to set out in detail. He made indeed no attempt to conceal the annoyance which he felt at not having been formally consulted by the Spanish government, when he had (as he considered) so many claims upon the gratitude of Spain. And he expatiated severely upon the invitation which had been addressed to the Universities, judges, and lawyers of Spain; persons whom he considered as so interested in the uncertainty and obscurity of the law that any desires of theirs would be sure to be directly opposed to public utility. Possibly Bentham would have felt the committee to be in less imminent danger of being misled, had he known that it was also receiving advice from a body of druggists. He must have forgotten that only ten months previously he had eulogized a Madrid advocate in the first of his Spanish Tracts, and had declared authoritatively that 'it is only in England that to lawyers and churchmen everything that tends to the happiness of the greatest number is an object of abhorrence.' Spain, however, did not share Bentham's distrust of the authority, in legal matters, of all men who have had a life-long familiarity with law; nor could the Cortes very well afford to wait until he had finished the great work which he had been labouring at for so long, and which when death seized him at the mature age of eighty-four still remained scarcely begun. Evidently Bentham considered that this mere unofficial appeal to him did not deserve to be treated with any particular return of politeness; for in even his first Letter he treats the committee and their Code with much grotesque Benthamic banter. And he goes so far as to handle the dignified Toreno himself somewhat roughly, as 'a functionary who has points of his own to compass' and conse-

quently would be likely to use Bentham's epistles only for the purpose of giving support to those points. Toreno had written to Quixote, but had been answered by Sancho. The Letter must have seemed to the grave Spanish aristocrat a most extraordinary production; and the stately note of cold politeness, in which he acknowledged its arrival, affords a fine picture of Castilian dignity, wounded yet still courteous. He took no further notice of Bentham's Letters, made no use of them in the Cortes, and, as we have seen, did not even preserve them. Yet Bentham, with his curious ignorance of the world and its ways, considered himself the injured party; and, in publishing these Letters, gave an account of the quarrel, gravely adding, 'To the hermit at London, all this is opaque; at Madrid, it perhaps is transparent.'

In spite, however, of this unpromising beginning, Bentham's Letters to Toreno were no fewer than seven, and of great length. But they were evidently intended, not as a genuine criticism of the Draft Code, but as a political philippic against a great part of the existing legislation of Spain. He wrote, not for the sake of assisting either Toreno or the Cortes, but in hopes of attracting to himself popular attention in Spain; 'with a view, I must confess, to my offer' of drawing up an entire body of Spanish legislation. These seven Letters discussed successively:—firstly, the danger of checking the free criticism of a country's laws: secondly, the unwisdom of silencing national desires for a reform of the Constitution; thirdly, the evil of sacrificing minorities to majorities; fourthly, the precautions which had been taken to exclude all ideas which were not those of the committee themselves; and fifthly, in the final letter, ecclesiastical persecutions. Bentham characteristically reproves the committee for announcing that they would adopt only such suggestions as might be 'in harmony with the political condition of our country.' He preferred men like his Spanish translator, Mora, who is said to have always desired 'legislation that recurred to first principles, without reference to existing systems.' Very severely, too, do the Letters criticize the rigour with which the framers of the Code had denounced the heaviest penalties, even that of death itself, against all seditious attacks upon the new Constitution. They regarded it as the greatest of public benefits; and, like good Utilitarians, judged that all assaults upon the greatest good ought to be checked by threats of the greatest evil. They forgot that no legal threat of punishment can be efficacious unless there is a force behind it, to make the threat be something more than a piece of advice; and that this force lies only in the public prestige which the legislator enjoys. If the Spanish Constitution had so little popular roothold as to be

in much danger from sedition, the needed force was lacking, and the greatest threats were useless. How far Bentham was from knowing or even suspecting the condition of the country for which he thought himself competent to frame an entire body of law, is shown by the fact that, when examining this proposal to make it a capital offence to attempt to change the constitutional form of government, he remarks with the greatest simplicity that all such punishments are needless in any country where the government's only aim is the greatest happiness of the greatest number. He illustrates this by the example of Colonel Burr, who had attempted to proclaim himself Emperor of Mexico and the United States, but whose attempt had been received by the Americans with no severer punishment than laughter, and who was still to be seen walking about New York in the peaceful enjoyment of all his liberties. But the Burr anecdote, even if Bentham's report of it be strictly authentic, was scarcely a valid precedent for such a country as was Spain in 1821; when bands of insurgents were becoming so numerous as to necessitate a special legislation against sedition, authorizing the prompt arrest of political leaders on mere suspicion, and when the Cortes was occupied in the desperate defence of the Parliamentary Constitution which was already on the verge of its overthrow. Impotent as all legal severity proved to be to defend it, still more impotent would have been the American indulgence which left Colonel Burr to the free enjoyment of all the felicities of a New York existence. Liberal politicians of a more practical type would perhaps have realized that the free institutions which had just been won, and whose frail existence was threatened on all sides by imminent perils, had much more to fear from royal hostility on one hand, and from popular misuse of the new-won liberties on the other, than from the checks that restrained the liberty of the press or postponed for nine years any proposals for reforming the Constitution,—which needed no reform half so urgently as it needed a little breathing-space to give it time to take root in the affections of the nation.

This evident gulf between Bentham's abstract theories and the actual facts of Spanish life, the contempt which he showed for the committee and their Draft Code, the attitude of superiority which he assumed towards the Cortes, the lack of exactness in many of his criticisms, and the frivolity with which he expressed them—a frivolity unbecoming in a man of his nationality and of his eminence—caused these Letters and their counsels to be completely ignored in Spain. Bentham had expected rather to be assailed than to be ignored. He had thought, from the outset, that his Letters might even be suppressed by the censorship and the printer

prosecuted: and had therefore taken the precaution of appealing to Toreno to use all his influence to remove any obstacles to their publication. Bentham solemnly warned the Conde that if he did not do this he would be preferring private utility to public, and showing himself an enemy of the greatest good of the greatest number. Consequently he threatened him that in any event the Letters would be published in various languages, and especially in French; so that any disloyalty of his to Bentham would be criticized in the salons of Paris. The Penal Code passed safely through the perils of revision; and nominally took effect in July 1822. But the political convulsions which immediately ensued prevented it from ever coming into active operation; and probably also prevented the quidnuncs of Paris from ever having time to indulge in any epigrams concerning Bentham and the Conde de Toreno and the seven Letters on the abortive Criminal Code.

COURTNEY KENNY.

IS COPYRIGHT A CHOSE IN ACTION?

'ACCORDING to my view of the law,' said Lord Justice Fry in the *Colonial Bank v. Whinney*¹, 'all personal things are either in possession or in action. The law knows no *tertium quid* between the two.'

Mr. Williams, in his work on Personal Property², speaking of shares in joint stock companies, patent rights and copyrights, says: 'For want of better classification these subjects of personal property are now usually spoken of as choses in action. They are, in fact, personal property of an incorporeal nature.' It is not very clear whether Blackstone³ intended to include copyrights, patents, and trade-marks among things in possession or in action. Sir Howard Elphinstone, however, in an article on choses in action in this REVIEW⁴, is of opinion that they are neither choses in action nor choses in possession.

Of one of these subjects at least, shares in joint stock companies, the House of Lords⁵, in the case mentioned above, took the view expressed by Mr. Williams. In that case it was held in the Court of Appeal⁶ by Lords Justices Cotton and Lindley, Lord Justice Fry dissenting, that shares, of which the certificates were in the hands of a trustee for a firm of stockbrokers at the time of their bankruptcy, were not choses in action so as to come within the exemption mentioned in the 'reputed ownership' clause of the Bankruptcy Act, 1883⁷.

That decision was reversed by the House of Lords, and Lord Blackburn, in giving judgment, said⁸: 'The principal argument used by counsel for the respondent, and it seems to have prevailed both with Cotton L.J. and Lindley L.J., was that choses in action, of which things in action is a translation, had a technical sense in our old law limited to the right to sue for a debt or damages. I do not think that made out. There was always a difference

¹ 30 Ch. D. 285.

² Thirteenth edition, p. 13. [See now fourteenth edition, pp. 40-41, where this passage is much expanded and altered, and Mr. Cyprian Williams carefully distinguishes copyrights and patents from shares.—Ed.]

³ 2 Steph. Comm., tenth edition, pp. 8 & 9.

⁴ LAW QUARTERLY REVIEW, ix, pp. 311, 314, 315.

⁵ 11 App. Cas. 426.

⁷ 46 & 47 Vict. c. 52, sec. 44, sub-sec. (iii.)

⁸ 30 Ch. D. 261.

⁶ 11 App. Cas. 439.

between personal property such as to be capable of being stolen, taken, and carried away, and so to be made the subject of larceny at common law, and to be capable of being seized by the sheriff under a *fi. fa.*, and other kinds of personal property. Personal property of the first sort, when belonging to a married woman, vested at once in the husband. The others the husband might reduce into possession, but did not have till he had done so. And when new kinds of property like stock in the funds, or, in more modern times, shares in companies, were created, questions arose as to whether they were within the principle of being in possession or not; but till the phrase was used in the Act of 1869 it never became important to inquire whether they were to be called things in action or not. But it is noticeable that in *Dundas v. Dutens*¹, Lord Thurlow, speaking of stock in the funds, said: "Those things such as stock, debts, &c., being choses in action, are not liable. They could not be taken upon a *levari facias*." The reason was the same as that for which they could not be the subject of larceny at common law, because they could not be seized. But Lord Thurlow thought choses in action an apt expression to use with regard to such things. Again, shares are not within the seventeenth section of the Statute of Frauds because they do not pass by delivery: Lord Denman in *Humble v. Mitchell*² thought choses in action a proper phrase to express that idea. Again, in *Ex parte Agra Bank*³, Wood L.J., in speaking of an assignment of shares, uses the phrase "whether in an assignment of a chose in action." He had no need to inquire whether it was a strictly correct phrase, but to him it appeared, as it had done before to Lord Thurlow and Lord Denman, that the phrase expressed the idea. And I think it was hardly disputed that in modern times lawyers have, accurately or inaccurately, used the phrase "choses in action" as including all personal chattels that are not in possession. In what sense, then, is it used in the fifteenth section of the Act of 1869, from which the present enactment is taken? It is not disputed that these words show that the legislature intended to take policies of insurance out of the order and disposition clause. Why not shares in companies also? I cannot answer that question in any way satisfactory to my mind.

It is clear from the authorities cited by Lord Blackburn that shares in joint stock companies and stock in the public funds must now be classed as choses in action.

A copyright, like a share, cannot be the subject of larceny at common law; it cannot be taken in execution under a *fi. fa.*⁴, nor,

¹ 1 Ves. jun. 196, 1 R. R. 112.

² L. R. 3 Ch. 555, 560.

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³ 11 A. & E. 205.

⁴ *Stephens v. Cadey*, 14 How. (Amer.) 528.

it seems, need a contract for its assignment be in writing¹. By virtue of the Copyright Act of 1842 it is personal estate². It is in its nature incorporeal. Is it a chose in action?

The following definitions have been given of choses in action: 'We will proceed next,' says Blackstone³, 'to take a short view of the nature of property in action, or such where a man has not the occupation, but merely a bare right to occupy the thing in question: the possession whereof may however be recovered by a suit or action at law: from whence the thing so recoverable is called a thing or chose in action.'

Mr. Williams says⁴: 'The term choses in action appears to have been applied to things to recover or realize which, if wrongfully withheld, an action must have been brought; things in respect of which a man had no actual possession or enjoyment, but a mere right enforceable by action.'

Blount, Cowell, and Jacob, who all derive the definitions given in their Law Dictionaries from the same source, Brooke's Abridgement, state that a 'chose in action is a thing incorporeal and only a right: as an annuity, obligation for debt, a covenant, voucher by warranty, and generally all causes of suit for any debt or duty, trespass or wrong, are to be accounted choses in action. And it seems chose in action may be also called chose in suspense, because it hath no real existence or being, nor can property be said to be in our possession⁵.'

Mr. Sweet, in his article on choses in action in the October⁶ number of this REVIEW, admits that the 'learning on this subject has grown up in an irregular way characteristic of the English law,' and that 'until the last few years it has been treated by our text writers rather as an incident to some other branch of law than as a subject by itself.' It may be due to the subordinate position which it has occupied, as well as to a certain laxity of expression, that the confusion which becomes apparent upon an examination of the above definitions has been allowed to creep into this branch of the law.

It is evident, I think, that the authors of the definitions given above included under the same name different classes of what I will, for the present, call property.

Blackstone, when he spoke of choses in action, was apparently thinking of the *fruits* of an action—something, that is to say, 'the possession whereof,' to use his own words, 'may be recovered by

¹ *Gould v. Banks*, 8 Wend. (Amer.) 562.

² 5 & 6 Vict. c. 45, sec. 25.

³ 2 Black. Comm. 396.

⁴ Pers. Prop., fourteenth edition, p. 27.

⁵ [This definition is not in Brooke *sub tit.* 'Chose in action & chose in suspense.' It would seem to have been made up by Cowell.—Ed.]

⁶ LAW QUARTERLY REVIEW, x, p. 303.

an action.' This is, I think, borne out by his description of the various kinds of property which might in his opinion be termed choses in action. 'Thus,' he says, '*money* due on a bond is a chose in action; for a property in the debt vests at the time of forfeiture mentioned in the obligation, but there is no possession until recovered by course of law. If a man promises, or covenants with me, to do any act, and fails in it, whereby I suffer damage, the recompense for this damage is a chose in action; for though a right to some recompense vests in me at the time of the damage done, yet what and how large such recompense shall be, can only be ascertained by verdict; and the possession [of the recompense] can only be given me by legal judgment and execution¹.' And again: 'But while the thing, or its equivalent, remains in suspense, and the injured party has only the right and not the occupation, it [i.e., the thing] is called a chose in action².' It is the money due upon a bond, or the money to be paid as recompense for an injury of which Blackstone is thinking. The idea presented to his mind by the expression 'chose in action' is a corporeal something in which one individual is said to have property, but of which another has—or is presumed by law to have—the actual physical possession, subject to the power of the former to unite property and possession in his own person by means of an action.

Mr. Williams' definition is evidently intended to include things both corporeal and incorporeal: everything, apparently, of which the owner has not actual physical possession, either because it is in the possession of some one else, or because it is incapable of physical possession on account of its incorporeality³.

Lastly, the definitions given by Blount, Cowell, and Jacob include only things which are intangible: mere rights. The division of property into things in possession and things in action is, in this case, the equivalent of the Roman law division into things corporeal and things incorporeal. Which of these classifications is the correct one?

Both Mr. Sweet⁴ and Mr. Cyprian Williams⁵ find fault with Blackstone's definition; but the objections which they urge are objections not to the form of the definition, but merely to the extent. It is not apparently disputed that property in action is something, 'the possession whereof may be recovered by an action; from whence the thing so recoverable is called a thing or chose in action.' Mr. Williams agrees that the term is applicable to 'things to recover or realize which, if wrongfully withheld,

¹ 2 Black. Comm. 396.

² Ibid. 397.

³ Pers. Prop., p. 9, note (g), & p. 10 [13th ed., materially altered in 14th ed. p. 28.—Ed.]

⁴ LAW QUARTERLY REVIEW, x, p. 315.

⁵ L. Q. R. x, 145, 146.

an action must have been brought.' Coke and Littleton appear to mean the same thing in the sentence: 'And so note that an action real or personal doth imply a recovery of something in the reality or personality, or a restitution to the same¹. In *Lampet's* case², moreover, Coke appears to distinguish between rights and choses in action when he speaks of 'the great wisdom and policy of the sages and founders of our law, who have provided that no possibility, right, title, nor thing in action shall be granted or assigned to strangers.'

All these great lawyers, therefore, agree in this: that a chose in action must be—or, at any rate, may be—something of which it is possible to recover possession.

Those writers who define a chose in action as 'a thing incorporeal, and merely a right,' are met with the difficulty that, having attempted to follow the Roman law and divide all property into two classes, corporeal and incorporeal, they have adopted a nomenclature which will in reason prevent them from so doing. For either they will be obliged to include among choses in possession things which are assuredly not in either actual or constructive possession, or they must form a third class to include property which, upon the face of it, the idea expressed in the term 'choses in action' would seem to be most apt to include. In the actual possession of the reputed owner it is evident that such things as money due upon a bond or damages in respect of breach of contract are not; and although 'constructive possession' is a very elastic term, it does not seem to be sufficiently elastic to cover such cases as these. At any rate, if it can be so stretched as to include a claim to possession as opposed to an actual hostile control, that would not appear to satisfy the requirements of the definitions, for in such a case there would certainly be no actual use or enjoyment by the legal owner.

Mr. Cyprian Williams is of opinion that, whatever may have formerly been the case, in modern times the phrase 'chose in action' has been limited to such incorporeal things as rights. But this is scarcely borne out by the phraseology of the Judicature Act, 1873. The section³ of that Act which relates to the assignment of choses in action is as follows:—

'Any absolute assignment . . . of any debt or other legal chose in action, of which express notice shall have to be given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been, effectual in law . . . to pass and transfer the legal right to such debt or chose in action from the date

¹ Co. Litt. 289 b.

² Coke's Rep. pt. x. 48 a.

³ Section 25 (°).

of such notice.' It is clear that chose in action must here refer, not to any incorporeal right, but to something tangible which the assignee can actually and physically receive.

But what is the meaning of the words 'other legal chose in action?' Can, for instance, a horse under any circumstances be a chose in action? Supposing that *A* promises me one of the horses in his stable upon the fulfilment of a certain condition, and that, when I have fulfilled the condition, he refuses to give me any one of his horses, am I at liberty to take any horse I please, or must I not rather invoke the aid of the law to select the particular horse which I am to have? Does not this constitute a chose in action? Or supposing that *A* offers me a particular horse, but when I have fulfilled the condition, hides it or otherwise prevents me from taking it, may I not bring an action for the horse, and does it not then become a chose in action? In the latter case, at all events, property passes to me upon the fulfilment of the condition, but I have no enjoyment until, by the aid of the law, I can obtain possession. The horse, therefore, is certainly not a chose in possession; if it is not a chose in action, what is it?

In the earliest reported case in which the expression 'chose in action' occurs, it is used of a corporeal chattel—a box containing title deeds. Again, in the case of *Franklin v. Neate*¹, which Mr. Cyprian Williams cites in support of his statement that a corporeal chattel is not a chose in action, it appears that Baron Parke, who tried the original action with a jury, was of opinion that the subject-matter of the action, a pledge, was a chose in action, and so directed the jury. In *Lampel's* case² there seems to be a distinction drawn between rights and things in action. And, lastly, the Judicature Act speaks of *receiving* choses in action, showing that those who framed that Act were thinking, not of the right of action, but of the fruits of the action.

I submit, then, that it is clear that things corporeal may be choses in action, and, further, that it is very doubtful whether rights, or in fact anything incorporeal, can properly be included in the term; the inclusion of such things being probably due to a confusion between the right and its subject-matter³. How can it be said that a right lies in action when in the usual course of things the person to whom it attaches can exercise it without having recourse to an action throughout the entire period during

¹ 13 M. & W. 481.

² Coke's Rep. pt. x. 48 a.

³ In the case of such incorporeal subject-matter of rights as a reputation, an action if brought is generally for damages in respect of the infringement of the right, and not, directly at all events, to recover the reputation; and it is suggested that the train of reasoning applied later in this article, in the case of a copyright, is equally applicable in such a case as this.

which it is vested in him? If an action is brought in respect of a right, it is for an infringement of it, and is in the nature of an action for trespass; it is brought not for the recovery of the right, but for an acknowledgment that the right actually exists. It is the recompense to be made for the infringement of the right, not the right itself, which lies in action. If the owner of a house lets it to *A* for six months, and at the end of that time *A* wrongfully refuses to give up possession, the owner of the house has, as owner, a right to possession and a right to use and enjoyment, but he is, for the moment, incapable of exercising these rights because the house is in the hands of another. If he brings an action of ejection, it is not to recover rights—which at the end of six months re-vest in him without any exertion on his part—but to recover the actual corporeal chattel, and thereby indirectly to obtain an acknowledgment that those rights exist.

Again, is a right property in the sense of something of value which can be the subject of purchase and sale? What is the value of a right as a right? Surely, nil! Is it anything more than a chain by which, legally, an individual is linked to all those corporeal things¹ of which he either has or, in contemplation of law, should have, actual physical control? Quite apart from the rights given to an actual possessor by law, a tangible object must always have had a value. An iron bar was of value to the savage who found it, although a stronger than he might take it from him; as long as he only met savages as strong as himself, the iron bar had a pecuniary or exchangeable value. But apart from the tangible object, between which and the individual whom the law calls owner it forms the connecting link, a legal right has no real value: it has not even an existence. It is true that the law allows nominal damages for violation of a right, but this is merely as an acknowledgment of the existence of a certain legal condition. In order to obtain substantial damages, the claimant must show that some injury has been done to something which is property—be it a thing corporeal such as a house, or incorporeal such as a reputation—in the sense that, apart from the law, it has an intrinsic value. I submit, therefore, that rights are not in reality property either in action or in possession, but are merely *vincula juris* by which property and persons are bound together, and should be classed accordingly.

But supposing that rights are property, and that, in the words

¹ Of course, if the subject of the right is incorporeal there cannot be an actual physical control, but there will be a control which, except for the intangibility, will be identical with the control over a corporeal object, and therefore must, I submit, be a constructive control.

of Lord Justice Fry¹, 'the law knows no *tertium quid*' between property in action and property in possession, to which of these two kinds of property do they most nearly approximate? Surely, to property in possession.

Let us take the particular case of a copyright as typical of rights generally.

Copyright is defined, by the Copyright Act of 1842², as 'the exclusive liberty of printing or otherwise multiplying copies' of a book or other literary work. It involves, therefore, the power to exercise three rights in relation to a literary work. In the first place, the author may publish the book to the world; in the second, he may make as many copies as he pleases between the date of publication and a fixed date thereafter; in the third, as an accessory to the other two, he may prevent any one else who is under the influence of the same law from doing likewise. Copyright, therefore, like the vast majority of other rights, is the legal power to deal with a piece of tangible property in a particular manner.

A share, as we have seen, has been judicially decided to be a chose in action³, and several writers have, for want of a better classification, included copyrights and patent rights also in this category, apparently on account of the supposed resemblance that they bear to one another. But I think that the inclusion of copyrights and patents, in the term 'choses in action,' on the ground of their analogy to a share, was owing to a confusion between the actual property which, though unapportioned, constitutes what is called a share, and the right of a shareholder in relation to the share.

There is undoubtedly a very noticeable distinction between a share in a company and a copyright. A share is an undivided portion of assets in the control of a company in relation to which the shareholder has certain rights. In the case of a share there is a person who holds, in relation to the shareholder, a position which bears a considerable analogy to that which is held by a debtor in relation to his creditor. That person is the company. It is true that it is only in certain events that the shareholder can recover his capital by obtaining from the Court an order for winding up the company. But there is always a possibility of recovering possession of the property parted with—a possibility realizable by a form of action. Until the petition for winding up is presented, the share is in the possession or control of the company; in relation to the shareholder it is a mere potentiality. By means of the petition the shareholder reduces the share, or its proceeds, into his possession, and the relation of shareholder and company comes

¹ *Colonial Bank v. Whinney*, 30 Ch. D. 285.

² 5 & 6 Vict. c. 45, sec. 1.

³ *Colonial Bank v. Whinney*, 11 App. Cas. 426.

to an end in a manner precisely similar to that in which, by the payment of a debt, the relation of debtor and creditor is extinguished. There is, in fact, an obligation arising out of a contract between the company and the shareholder. The shareholder has not occupation, but he has a right to occupy the pecuniary equivalent of his share upon the non-fulfilment by the company of the promises which induced him to part with his money. A share, therefore, if not strictly a chose in action, bears a close resemblance to it.

Very different is the position of the proprietor of a copyright. Taking, for instance, a case in which the original owner of a copyright has parted with the whole of his interest in his work and has executed a written assignment in conformity with the provisions of the Copyright Act 1842, what is the position of the assignee?

If, after he has duly registered his name at Stationers' Hall as proprietor, the assignee has not the 'occupation,' he certainly has not a 'bare right to occupy.' There is nothing that he can obtain by bringing an action. Unless and until some one pirates the copyrighted work, nothing is being withheld from him. The person who alone could stand in the same position with regard to the assignee of the copyright, as does a debtor to his creditor, is the assignor; but by the due execution of the assignment the assignor parts with his entire interest in the copyright, and thenceforth has no more control over it than has an absolute stranger¹. So that the difference between a debt and a copyright is, that in the case of a debt the creditor is said to have property in the money owing, and has also a right to the possession at present vested in the debtor—a right realizable by an action; while, in the case of a copyright, if the assignee does not obtain possession at the same time as he obtains property—namely, at the date of the execution of the assignment—he can never obtain it at all, for the reason that, as has been pointed out, it is not in the assignor, and there is, therefore, no one against whom an action can be brought for its recovery.

Then, has the assignee of a copyright possession? I submit that he has.

Mr. Williams' definition of a chose in action is that of which a person has 'no actual possession or enjoyment;' of a debt or of money due upon a bond, the creditor and the holder of the bond respectively have neither possession nor enjoyment until the money is actually paid into their hands; of a copyright, the assignee has

¹ The action for infringement of a copyright is not analogous to an action to recover a debt. The remedy in the former case would originally have been an action on the case similar to the action for disturbance of an exclusive franchise (*Blacketer v. Gillett*, 19 L. J. C. P. 307; *Newton v. Cubitt*, 31 L. J. C. P. 246), in the latter an action of debt or assumpsit.

enjoyment as soon as the assignment is executed, but he has not the possession in the sense of physical control.

There is, however, another kind of possession recognized by the law: constructive possession. The term 'constructive possession' is generally used to denote those cases in which the person who has an immediate right to possession is not, as a matter of fact or law, in possession at the time, but is nevertheless permitted to bring, for the protection of his property, actions usually available only to the person exercising (in person or through a servant or other mere custodian) physical control. The phrase is, however, ambiguous, and might, it is conceived, be not improperly applied to cases in which, while the owner of property has not—and, owing to its nature, never can have—a physical control of the property, he yet has the same full use and enjoyment, so far as the nature of the property permits, as he would have were the property corporeal and he in physical possession.

Such a possession of incorporeal property, indeed, seems to have been recognized by Littleton¹ when he admitted that an advowson was capable of possession 'because a man hath in it as absolute ownership and property as he hath in lands and rents.' Of such incorporeal things as offices, seats in the House of Lords², and exclusive franchises³, there may, it appears, be possession. If incorporeality does not in these cases prevent the owner from having possession, why should it in the case of a copyright?

'For the present we start with this,' write Sir Frederick Pollock and Mr. Justice Wright in their work on 'Possession in the Common Law⁴,' 'that any of the usual outward marks of ownership may suffice, in the absence of a manifest power in some one else, to denote as having possession the person to whom they attach.' And again⁵: 'De facto possession is the sum of acts of ownership, and when the owner of a thing is ascertained, he is entitled to act as owner in every lawful way, unless it appears that he has divested himself of some part of his general powers. And as the first condition of exercising full dominion he is entitled to undisturbed control of the thing.'

In the written assignment, and in the entry of his name upon the register at Stationers' Hall, the assignee of a copyright has outward marks of his ownership, and there is not only no manifest power, but no power at all in any one else. De facto possession

¹ Co. Litt. s. 10. 17 a.

² Pollock and Wright on Possession in the Common Law, pp. 35, 36.

³ In the cases of *Blacketer v. Gillett* (19 L. J. C. P. 307), and *Newton v. Cubitt* (31 L. J. C. P. 246), the declaration alleged that the plaintiffs 'were lawfully possessed of an exclusive ferry.'

⁴ Page 2.

⁵ Page 25.

—if by that term is meant physical control—the owner of a copyright cannot have, owing to the nature of his property, but he has as full a dominium as under the circumstances is possible, and therefore he presumably has also a possession, if only a quasi or constructive possession. Is it not possible that it was a misapprehension as to the extent of the term ‘possession,’ and the belief that it covered merely those cases in which there was an actual physical control, which has led to the extension of the term ‘choses in action’ to include incorporeal property generally?

Mr. Sweet suggests that under the law existing prior to 1870 it would have been open to a husband upon marriage to reduce his wife’s copyrights into his possession by registering them in his name. But there is an obvious difference between the reduction into possession by a creditor of a debt owing to him by means of an action, and the reduction into possession, under the old law, by a husband of his wife’s copyright by means of registration. In the former case the creditor obtains control and enjoyment of that which was, before the action, said to be his property, but of which he had not the full use and enjoyment. In the latter, the husband would have obtained merely the same rights which the wife had formerly enjoyed, and therefore it is difficult to see why, if after registration in the husband’s name the copyright was in his possession, it was not in the wife’s possession when registered in her name. But whether a copyright is a chose in action or a chose in possession the husband would, apparently, have been obliged to register his own name together with his wife’s at Stationers’ Hall before an action could have been brought for infringement of the wife’s copyright, and therefore this is perhaps hardly a good test of its nature.

Copyright certainly seems a proper subject for exemption from the reputed ownership clause of the Bankruptcy Act, 1883; for that section¹ was passed with the object of preventing persons from obtaining a fictitious credit by having on their premises property which did not belong to them, and it is difficult to see how any one could obtain credit through the possession of such an intangible thing as a copyright. But it is perhaps doubtful whether the clause could have any application in the case of a copyright, for, except when there has been an actual transfer, the copyright cannot be said to be in the order and disposition of the publisher, since a transfer will not be presumed unless the intention to transfer has been unmistakably manifested, as, for instance, by signing a receipt for the purchase money². And therefore probably not even for the purpose of escaping from this enactment

¹ 46 & 47 Vict. c. 52. sec. 44, sub-sec. (iii).

² *Latour v. Bland*, 2 Stark. 382.

is it necessary that a copyright should be classed as a chose in action.

To sum up, then, there is this great distinction between debts, money in the funds, and perhaps shares, and such intangible forms of property as copyrights and patents, that while in the former cases there are two parties standing towards each other in the relation of debtor and creditor, the legal owner—the creditor—not having enjoyment of his property; in the latter there is a single person only, who is legal owner, and who has enjoyment of his property as far as he can ever have it. These various kinds of property ‘are so different in their nature and legal incidents, that care must be taken not to be misled by giving them all a common name which conceals their differences¹.’

An attempt to identify the division of property into choses in action and choses in possession, with the division into things corporeal and things incorporeal, can only lead to confusion, and therefore copyrights, patent rights, and rights of all kinds, if they must be classed as property at all, should be classed under the head, to which I submit that they more properly belong, of property in constructive possession.

SPENCER BRODHURST.

[If copyright must needs be a thing either in action or in possession, I agree that it must be in possession. Clearly an action against an infringer is in respect of a new and distinct cause of action, and reduces into possession not the right but the damages for violating it. On the other hand, infringement of such rights is not at all like disseisin, not even like disseisin of rent, for the party entitled is not deprived of any certain sum due to him.—ED.]

¹ Lindley L. J. in the *Colonial Bank v. Whinney*, 30 Ch. D. 284.

MAINTENANCE AND EDUCATION.

IN his article on this subject in *LAW QUARTERLY REVIEW*, vol. x, p. 330, Mr. T. K. Nuttall lays great stress upon an ill-reported case of *Knapp v. Noyes* (1768), which is to be found in Ambler 662 (not 661). In a footnote to Mr. Blunt's edition, the learned editor says that he 'has been unable to meet with any entry of this case in Lib. Reg.,' and the rest of the note is taken up with the order in the preceding case of *Bibin v. Walker*, to the confusion of the reader. I have been at the pains of searching for the record and have found the original bill, which was filed on April 20, 1763, amended by order of the Court on June 23, 1764, and the reference to which is 'Chancery Proceedings, 1758-1800, No. 517.'

It appears that the testator, George Noyes, made his will on August 27, 1748, and died in August, 1752. His wife Ann was appointed executrix, and alone proved the will, and it is to be noticed that she was one of the respondents, together with the eldest son and her daughter, Ann the younger. The oratrix was another daughter, then named Sarah Knapp, wife of the orator, and it was alleged and admitted that these persons had intermarried with due consent. George and Elizabeth died before the testator, and Mary, the remaining child, died unmarried before bill filed.

The material portions of the will, as far as contained in the amended bill, were as follows:—the testator 'gave and bequeathed to every one of his daughters, Ann, Sarah, Mary, and Elizabeth, and to his younger son George, the sum of £1,500 apiece, to be paid to his said daughters respectively on their several marriages, with the consent of his executrix and executor therein named, and the survivor of them. And in case any or either of his said four daughters should marry without such consent, then he gave them respectively the sum of £500 and no more, and directed that after every such marriage without consent, £1,000 should be paid to, and among, such of his daughters as and when they should marry with such consent, in equal portions, and did will that his son George's £1,500 should be paid him if, and when, he should attain the age of 21 years. And in case his said daughters and his son George, or any of them, should die before their respective legacies should be payable, he did will that the legacy and legacies of him, her, or them, so dying, should be paid to, and amongst, all his then

surviving children (except T., and the daughter or daughters so marrying without such consent), equally share and share alike such legacy or legacies of him, her, or them, so dying, to be paid to his said surviving children, as and when they should be severally entitled to receive their legacies of £1,500. . . . And it was his will that after his said wife's decease, interest after the rate of 4 per cent. for £1,500 apiece, to be paid to every one of his said daughters and younger son George, then living, *every year for their maintenance and education, to the time their respective legacies should become payable*, and did charge all his lands, tenements, and hereditaments with the payment of such interest.' He also appointed his executor and executrix guardians of his infant children. The claim was for accounts, &c., for immediate payment of the sums accruing directly and by substitution and representation, and this involved the question of the time when the portion of Mary was payable¹.

Ann, the widow and executrix, denied assets, alleged maintenance and education of the oratrix from the testator's death to her marriage, and payment of interest thenceforward for a great part of the time. She further alleged that a certain estate was given her for life, that she might be the better enabled to maintain, educate, and provide for the children, and claimed that there was no charge thereon which could take effect until her death, the complainants disputing this claim.

The real question before Lord Camden was whether the testator meant to restrict the marriage with consent to under the age of 21, or intended his executor and executrix to have a general power to whatever age. The Lord Chancellor plainly states that he would find for the plaintiffs with reluctance, and he then proceeds to discover reasons for restricting the consent, a course which all Equity judges have been forward to adopt. If he could hold that Mary was entitled to be paid on attaining 21, the gift-over would not take effect, but her legal personal representatives would be entitled. He finds two reasons, one, that the executors (who were also guardians) were the people to consent, and as guardians their functions would cease at 21, and the other, founded on the maintenance and education clause. But, as the judgment is very shortly reported, it is important to observe that there were some signs in the will which might show that the maintenance and education were intended by the testator to be restricted to 21 or marriage. *Firstly*, the legacy was vested both by the actual words

¹ I have not succeeded in finding the record of the decree in this case, and in all probability it was not drawn up, so that the report in Ambler must be taken as accurate as far as it goes.

of the original gift, which only deferred payment, and by the gift of intermediate interest, as in *Vize v. Stoney* (1841), 1 D. & War. 337; and it would require very strong and clear words to divest property, especially where the legatee had been in receipt of the interest thereof. *Secondly*, in the case of George's portion, there was a direction that he was to be paid the principal 'if, and when, he should attain the age of 21 years,' when interest would no longer be payable to him under the maintenance and education clause, showing that here the testator clearly confined his meaning of the words to the age of 21 at most. It is a fair inference from this that he used the words in the same sense with reference to his daughters, according to the rule by which words are construed with the same meaning throughout a document, where such construction is reasonable. This would cause the daughter's interest for maintenance and education to cease at 21 or marriage, and would of course involve the payment of the principal at the same time. *Thirdly*, the gift-over itself is not clear, the £1,000 being directed to be paid to unmarried daughters only, who were to take 'as, and when, they should marry.' If the words requiring consent be read of marriage generally, the chances were increasingly in favour of no daughter being able to take under the gift-over, and it was a rational restriction to confine the divesting clause, as was done by the Lord Chancellor.

I submit, therefore, that it is reasonable to hold that the Lord Chancellor's remarks were not intended to be general, and were well founded on the particular will before him. It is to be remarked also that the will was inartistically drawn, and that the report is apparently but a short note of part of the judgment. And as to citing this case as an authority, why should 'one man's nonsense be interpreted by another man's nonsense?' (See also Lord Halsbury's protest in *Scalé v. Rawlins* '92, A. C. 342, and *In re Jodrell* (1890), 44 Ch. Div. at p. 605, and the judgments of Lindley L.J. in the latter case, and *In re Tredwell* '91, 2 Ch. 652.)

A few words as to Vice-Chancellor Wood's decision in *Gardner v. Barber* (1854), 18 Jurist 508, which is strongly relied on by Mr. Nuttall. It was held that the particular annuity for maintenance and education stopped when the grand-daughter attained 21: but there were two special reasons for this, (a) as noticed by Mr. Nuttall, two other annuities of the same amount were expressly given for life; (b) in the gift of the annuity a parenthesis was inserted, '(and so in proportion for any less term than a year),' which was not applied to the annuities, which were expressly given for life; and (c) the annuitant was a daughter of the testator's daughter Amelia, to whom one moiety of the residuary estate was

given for life, with remainder to her children at 21 or marriage, 'with full powers and authority for his said trustees *during the minority* of such' children, to apply the income for or towards their maintenance and education; from which it is evident that the testator confined 'maintenance and education' to the age of 21. So that we may fairly say that the Vice-Chancellor's decision was right on the will before him, and that his remarks on the general rule were obiter dicta, as were also those by Leach M.R. in *Badham v. Mee* (1830), 1 Rus. & M. 631.

There are two authorities not cited by Mr. Nuttall which are important cases against his main contention. The first is *Alexander v. McCulloch* (1787), 1 Cox 391, before Thurlow L.-C., and is wholly opposed to the words attributed to Lord Campden. The will ran, 'I order that a fund may be lodged with J. Brown of Glasgow, so as to raise £48 per annum, for the support of J. H.'s children, to be paid them from time to time as their necessities require, without any regard to their father or mother.' The Lord Chancellor said he thought it probable the testator might mean this allowance to take place only during the minority of the children; but that upon the words he had made use of, it was impossible to restrain it to anything short of a life interest. The other case is *Kilvington v. Gray* (1839), 10 Sim. 293, where an annual allowance was left for the benefit of a boy until he should attain 16, 'I then leave him to the care of my trustees to provide for him in some business or profession, and his future maintenance, out of my funded property.' Maintenance was expressly given 'during their minorities' to three other infants, but out of life annuities. Shadwell V.-C. held that the boy was entitled to maintenance for life, saying, 'It seems to me that the word "future" comprehends all time'; though it is difficult to see how this word could make any difference, as a provision for maintenance must in each case contemplate futurity.

But the real point of the matter is that the words 'maintenance and education' are not technical words, and that they have no meaning in law, other than that in which the testator uses them, whose meaning, if not clearly expressed, must be taken to be that which would be intended by an ordinary man not trained to legal phraseology. Surely if this principle is sound, V.-C. Hall's words in *Wilkins v. Jodrell* (1879), 13 Ch. D. at p. 570, become very material, supported as they are by *Soames v. Martin*¹, *Frewen v. Hamilton*², &c. He says, 'There was a time when education came to an end much sooner than it does at present, and I think there was a Lord Chancellor in our own time who left Oxford before 21. But education at the present day, amongst persons in a certain

¹ (1839), 10 Sim. 287.

² (1877), 47 L. J. Ch. 391.

class and position in life, ordinarily lasts beyond 21; and I should say myself that a provision for education, according to the ordinary purpose and meaning of such a provision, is not limited to the age of 21; and if so, why should maintenance, which is another object of the gift, be limited to 21, being associated with education? Of course education ceases at a certain time, according to the particular purpose for which the person is to be educated, but maintenance is required, and lasts during his whole life; and giving a fair construction to such a provision, whether it be by way of trust or by way of gift, there is, in my opinion, nothing to limit it to minority.'

Again, supposing the question were considered apart from authority, how can the addition of the words 'for his maintenance' act so as to cut down an annuity that would otherwise last for life? And supposing the whole purpose of the gift failed by reason of the annuitant not requiring maintenance, how could the failure of the purpose affect the annuity?

W. A. BEWES.

JUDICIAL POWER IN THE UNITED STATES¹.

THIS is a learned and valuable book, of which the value is not to be measured by an Englishman's appreciation of the occasion which led to its being written. The Supreme Court of the United States upheld the power of Congress to make paper money legal tender on a ground which it expressed thus. 'Congress, *as the legislature of a sovereign nation*, being expressly empowered by the constitution to "lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States," and "to borrow money on the credit of the United States," and "to coin money and regulate the value thereof and of foreign coin"—and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks, and to provide a national currency for the whole people in the form of coin, treasury notes and national bank bills—and the power to make the notes of the Government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized nations, and not being expressly withheld from Congress by the constitution—we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is *an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress, consistent with the letter and spirit of the constitution*, and therefore, within the meaning of the instrument, "necessary and proper for carrying into execution the powers vested by this constitution in the government of the United States"' (*Juillard v. Greenman*, 110 U. S. 449). The passages which we have printed in italics led Mr. Brinton Coxe to feel serious alarm for the security of the right of the Supreme Court to set aside any Act of Congress as being unconstitutional. What if Congress should pass an Act negativing that right? It could hardly be said that the power of requiring the Courts to apply the laws enacted by them is not one belonging to the legislatures of other sovereign nations, or that it

¹ An essay on Judicial Power and Unconstitutional Legislation, being a commentary on parts of the Constitution of the United States. By Brinton Coxe, of the Bar of Philadelphia. Philadelphia: Kay & Brother, 1893. One volume, large 8vo., xvi and 415 pp.

is not conducive and plainly adapted to the power of Congress to legislate. The only safety seemed to lie in the contention that the power to require the Supreme Court unconditionally to apply its enactments is expressly withheld from Congress by the constitution, that it is a power not consistent with the letter any more than with the spirit of the constitution.

But to find in the constitution the expression thus desiderated was perhaps difficult. That instrument says of itself that 'the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding,' but not that those judges or the Supreme Court shall be bound by it, anything in the laws enacted by Congress notwithstanding. And the powerful argument by which Chief Justice Marshall established the right of the Supreme Court to treat Acts of Congress as unconstitutional and void, in *Marbury v. Madison*, 1 Cranch 176, is rather of an inferential character than a simple reference to any text. It would seem easy to contend that the judges in *Juillard v. Greenman* laid too much stress on expression as opposed to reasonable construction. Or, since the instrument says that 'this constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land,' it might be thought on this side of the Atlantic that a mind which did not at once find in those words the expression desired would hardly find it anywhere. But although we cannot share the fear that the branch of the Supreme Court's authority which is in question has incurred any real danger, we are too well convinced of the importance of that branch to regret that to Mr. Coxe every letter of the constitution presented a claim for such scrupulous examination as might be due to a sacred scripture, and to all the support which he could give it by exposition and analogy. Indeed, the volume before us represents only a part of the labour which he deemed it necessary to bestow on the subject, and which his death prevented him from completing.

That labour was to have resulted in two parts, the second of which, never executed, was to be a textual commentary on the relevant passages in the constitution, establishing the express character of the power lodged in the Supreme Court to treat Acts of Congress as void for exceeding the constitutional authority of that body. We miss it with the less regret because Mr. Meigs, the editor of the volume, himself the author of a paper in the *American Law Review* for 1885, which enriched the subject with much historical research, has given, in the prefatory note, a sketch of what he gathers from the author's papers to have been his argument. What we have is the first part, completed and set up in type in

Mr. Coxe's lifetime, and being an historical commentary. In this Mr. Coxe has brought together with great industry whatever he could find, in any country or age, relating to the power of judges to set aside the Acts of a legislature, whether in vindication of a constitution, written or unwritten, or in obedience to any other principle of right held to be of higher authority than the will of the legislature. So far as the materials collected are of older date than 1787, they serve to show the intellectual surroundings of the framers of the American constitution, and so to throw light on their point of view and on the meanings with which they were likely to use particular words. So far as they are later than 1787, they are still relevant to the discussion by virtue of the reference made by the Supreme Court in *Juillard v. Greenman*, and above quoted, to 'the powers belonging to sovereignty in other civilized nations,' as helping to measure the powers belonging to Congress as incidental to those expressly given to it.

We thus pass successively in review France, Switzerland, Germany, the rules concerning rescripts and the *jus legum* in Roman law, the authority of the Canon law in England before the Reformation and elsewhere; all the claims that have been made to limit the power of the English Parliament, whether on behalf of the common law, the Royal prerogative, or the law of nations; the restrictions on legislation by the British colonies, the modes in which those restrictions have been enforced, and the precedents in the American States between the Declaration of Independence and the framing of the actual federal constitution. It appears that on the continent of Europe the Courts must give effect to the enactments of the legislature, even when they plainly exceed the limits set to its powers by a written constitution. Such an instrument is held to be addressed to the legislature and not to the judges. But it will greatly interest the English reader, and be less familiar to him, to find that in Rhode Island the power of the legislature was judicially held to be limited by constitutional principle at a time when no constitution had been adopted by the State since the Declaration of Independence, and when, therefore, the only restrictive writing which could be quoted was the clause against legislation repugnant to the laws of England which was contained, as usual, in the colonial charter. This was the case of *Trevett v. Weeden*, decided in 1786. The enactment in question was one which assumed to deprive offenders against a legal tender law of the right of trial by jury, and the argument against its binding force, to which the judges gave effect, assumed the continuity from colonial times of the terms on which the people of Rhode Island were associated together as a political body. Those terms, it was

said, included trial by jury as a constitutional right of the citizens, and the general assembly made laws and levied taxes by no other authority than that of the constitution, which consisted in those terms of association. The argument was a little aided by the fact that the enactment required the trial to be 'without any jury, by a majority of the judges present, according to the laws of the land,' and could therefore be represented as being inconsistent with itself. But probably no one who was unconvinced by the main contention would have hesitated to read the last words as meaning, 'in other respects according to the laws of the land.' We have, then, proof on both sides that the judicial power of controlling an enactment by a constitution does not depend, as in this country it is often supposed to depend, on the constitution being a written one. The power does not exist under the written constitutions of Europe, but it was held to exist under the unwritten constitution of an Anglo-American State. The difference, as Mr. Coxe remarks, appears to be more closely connected with the varying degrees of importance and respect enjoyed by the judges in different countries.

Before the relevant clauses of the constitution of the United States had received their actual shape, the judges of North Carolina, in the case of *Bayard v. Singleton*, had set aside an enactment of the State legislature interfering with the right of trial by jury in a civil suit, as being at variance both with the written constitution of the State and with the Articles of Confederation by which the United States were then mutually bound. However, a different result was reached in the case of *Rutgers v. Waddington*, in the State of New York, which then also had a written constitution, but in which party feeling raged with such intensity that the position of the Court was peculiarly difficult. It resorted to interpretation, possibly somewhat strained, in order to avoid a conflict between an enactment of the legislature on the one hand, and the law of nations and the treaty of peace with England on the other hand; and, following what Blackstone had laid down concerning the British Parliament, it said, 'The supremacy of the legislature need not be called into question; if they think fit positively to enact a law, there is no power which can control them.'

Besides thus tracing the environment in which the framers of the constitution of 1787 were placed by the legal precedents and literature of their own and other countries, Mr. Coxe has followed the history of the relevant clauses through the debates and resolutions of the convention, and added all the light which can be thrown on the intentions of the framers from their writings or from other sources. The investigation leaves no doubt on our mind that their intention was to give the Supreme Court the power of declaring

Acts of Congress unconstitutional and void which it has always exercised, nor can we doubt that they did so in words which no unbiassed reader of the constitution can fail to find sufficiently express. And we welcome the book as a valuable contribution to the literature of a legal and political question, of which the importance is not unlikely to increase in constitutional countries.

J. WESTLAKE.

MR. PIKE ON THE HOUSE OF LORDS¹.

MR. PIKE has made a valuable contribution to constitutional history in the book before us. It is valuable in several ways. It is learned, yet not lengthy. It is free from political controversy and constitutional optimism. It describes perhaps better, and at any rate more consecutively, than they have ever been described before, the history of the privileges and of the judicial powers of the House. It supplies much very useful material and some new light for the treatment of the growth of the peerage and of the legislative powers of the House.

But the attitude of isolation which the writer assumes is somewhat unfortunate. It is true that, in the preface, Hallam and Dr. Stubbs are mentioned as 'well-known historians' and Freeman as a polemical essayist; but the careful reader might search the text through without becoming aware that Freeman had ever lived, or that Hallam was more than a careless reproducer of secondhand information; while if he chose to follow up the references to the mistaken utterances of an 'eminent writer' or of 'recent historians' he would learn after some research that Dr. Stubbs had, according to his lights, made some contributions to constitutional history. The book loses value from this perverse determination to ignore the work of others. We cannot always be re-commencing the study of the constitution *ab ovo*. There is ample room for such a book as Mr. Pike has written, but the reader wants to know how he may connect the facts put before him with the general scope of constitutional history; how Mr. Pike addresses himself to the solution of problems which 'eminent writers' have admittedly left unsolved; what are his points of difference where he differs; with what qualifications he agrees when he does agree. There is an unpleasant suggestion of controversy as well as of incompleteness in a book which passes in silence by all the acknowledged modern authorities on the subject of which it treats.

The chapter on the *Curia Regis* suffers much from this mode of treatment. Here are many open questions. Was the Curia merely a name for personal government by the King? was it a definitely

¹ A Constitutional History of the House of Lords. From original sources. By Luke Owen Pike. London: Macmillan & Co. 1894. 8vo. xxxv and 405 pp. (12s. 6d.)

constituted court? was it a body of great officials forming, in effect, a standing committee of the Commune Concilium for purposes of justice and finance? We want an answer to these questions, and, instead, we have a learned and complicated account of the Courts and Councils of the Norman, Angevin, and Plantagenet kings, written as though the subject had never been approached before, and leaving the reader to find his own way through the maze and to draw his own conclusions.

As regards the creation of an hereditary peerage Mr. Pike has not only a store of interesting facts, but a very distinct theory. He holds that the summons to Parliament was a liability of tenure, that the writ of summons was meant to enforce the attendance of the baron, and that a summons followed by a sitting in Parliament did not establish a claim to an hereditary peerage until, with the introduction of new ranks in the peerage, rules of precedence came into existence and the dignity became an object of ambition. Thus obedience to a summons by writ was considered to give a right to the man so summoned and to his heirs lineal, and the contention was allowed. But Mr. Pike's attitude of opposition to current authority leads him to insist needlessly upon admitted facts, and to press the importance of tenure beyond reasonable limits. No one doubts that the majority, if not all, of the lords summoned to the early Parliaments held baronies of the Crown; or that there were intermissions in the summons of certain lords; or, sometimes, a failure to summon the heir of a man who had taken his seat as a baron. And, with deference to Mr. Pike, there is as little doubt that a baron who had received and obeyed a summons was, in practice, summoned to successive Parliaments and his heirs lineal after him. At what precise moment the practice became a rule and the rule created a right may not be easy to say, nor is it very material. But that the right when it came into existence rested on the writ of summons, and not upon tenure, seems practically certain. Some of the cases to which Mr. Pike refers do not sustain his theory. Thomas Furnival held of the Crown though not by barony; Warine de l'Isle held by barony though not of the Crown. Both were summoned, and the inference is that neither tenure of the Crown nor tenure by barony were essential conditions of summons.

The history of the Lords Spiritual is well told, and Mr. Pike brings out very clearly the mode in which the bishops lost their right of trial by peers owing to their claim to be exempt from all secular jurisdiction. We cannot, however, accept without reserve the assertion that the bishop's right to a summons rested on his temporal barony. Dr. Stubbs thinks that the bishop was sum-

moned in right of his spiritual functions, and points out that in the vacancy of the see, or the absence of the bishop, the guardian of the spiritualities was summoned in his stead. Mr. Pike contends that the guardian of the spiritualities, who clearly did not hold a barony, received a summons in order that he might communicate to the clergy the contents of the *Praemunientes* clause. One needs some evidence of this. It is strange that a man should be summoned who, on Mr. Pike's own showing, had no right to a seat, in order that he might transmit another summons to a body who, as Mr. Pike admits, habitually and notoriously declined to obey it.

In two other matters the controversial spirit seems to have led Mr. Pike astray. Archbishop Stratford, charged with disloyalty by Edward III, claimed to answer these charges before his peers in Parliament. He was desired to appear in the Exchequer: he did so, and made some answer to the charges, still claiming to appear in Parliament. After some bickerings the King met the Archbishop in Parliament and a reconciliation took place. But the statement that Stratford appeared in the Exchequer arouses Mr. Pike to unnecessary wrath. It originates with Birchington, a monk, who wrote in, or about, 1382, and has been accepted by Hallam and Dr. Stubbs. Mr. Pike says that it is inconceivable that Stratford, who was maintaining the rights of the spiritual peers, could have condescended to recognize the jurisdiction of the Exchequer; that he did about this time appear in the Exchequer, not in person but by his attorney, and not to answer charges of disloyalty but to meet a demand for his quota of a clerical subsidy; that the story arose out of 'a monkish ignorance of law, and the idle gossip of a monastery,' and that, in point of fact, the historians who have followed Birchington are much to blame.

Yet after all Birchington is probably right: he never says that Stratford submitted himself to the jurisdiction of the Exchequer sitting as a Court of Revenue, or a Court of Pleas, but that, on his second appearance, '*super articulis sibi objectis Regis consiliarios informavit.*' Madox tells us that the King's Council sat not unfrequently in the Exchequer, and there sometimes dealt with important business which did not concern the revenue; and what really happened was that Stratford, who wanted to answer to the charges made against him in Parliament, was ordered to appear, and did appear, before the King's Council sitting in the Exchequer.

Again, Mr. Pike cannot bring himself to believe that, after the abolition of military tenures, James II should have called a Great Council of the Lords in 1688. It is strange that he should omit any notice of such a Council when he mentions the summons of the Lords by Charles I in 1640, and their spontaneous meeting at

the Guildhall after the flight of James. One cannot expect Mr. Pike to accept the statement of Macaulay, but Macaulay cites authorities which admit of verification. James himself, in a fragment of his memoirs preserved in Clarke's biography, says that he 'ordered the Lords Spiritual and Temporal to wait on him at Whitehall in the nature of a Great Council, as had been usually practised in such disorderly times.' His statement is confirmed by the contemporary testimony of Luttrell and Burnet, and it is hard to see why Mr. Pike should ignore a historical fact unless it be that the fact does not accord with his theory as to the position of the Lords as a feudal council.

To one point of modern controversy Mr. Pike has made a valuable contribution. The question whether the succession to a peerage is a right which the person entitled may waive, or a liability of which he cannot divest himself, has been discussed, in the case of Lord Coleridge, with more vehemence than logic or learning. Mr. Pike differs from Dr. Stubbs in upholding the theory of 'ennobled blood,' but it would seem that the two writers do not mean the same thing. Dr. Stubbs refers to the continental practice by which a dignity acquired by the ancestor conferred the privileges of nobility upon the entire family. Mr. Pike refers to the heritable character of a dignity which descends, not, as he truly points out, like an estate in fee to heirs general, but to heirs lineal, unless the descent is otherwise regulated by the patent. Granted that this heritable character attaches to a peerage, the liabilities must descend as well as the rights; and that the writ of summons is a liability, and was once regarded as an irksome liability, Mr. Pike establishes beyond question.

On this view of the law Lord Coleridge assumed the rights and liabilities of a peerage from the moment of his father's death, always supposing that he was the person entitled to succeed. While the House of Commons was still unprovided with the evidence on which it usually acts in such cases, Lord Coleridge incurred another disability by the acceptance of office, and the House, having evidence on this point ready to hand, declared the seat vacant. But if Lord Coleridge had not asked for his summons to the House of Lords, nor yet for the Stewardship of the Chiltern Hundreds, could he have retained his seat in the House of Commons? Towards the solution of this question Mr. Pike supplies more material in two pages (239-241) than can be found in the reports of the evidence taken by a Committee of the House of Commons last summer.

In conclusion, we part from Mr. Pike with gratitude for the learning and clearness which he has brought to bear upon an

intricate subject. If this review has been more critical than laudatory, this is partly due to the great and obvious merits of the book ; partly to the fact that the historian of the House of Lords follows a path overgrown with technical and antiquarian research, or strewn with the wreckage of bygone controversies.

W. R. ANSON.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

Chapters on the Principles of International Law. By JOHN WESTLAKE.
Cambridge: at the University Press. 1894. 8vo. xvi and 275 pp.
(10s.)

THE third holder of the Whewell Professorship has long been widely known as one of the few authorities in this country upon the difficult topic which is best described as the 'Conflict of Laws,' but more usually, though very misleadingly, as 'Private International Law.' Mr. Westlake has, however, also long been known to experts in such matters as a high authority upon International Law, properly so called. More than twenty years ago he was one of the founders of the *Revue de Droit International*. He was one of the original members of the *Institut de Droit International*, and since 1888 has occupied the chair in which he was preceded by Sir W. Harcourt and Sir H. Maine. The volume before us doubtless contains the substance of lectures delivered from that chair. It is, as we are informed, 'not a detailed treatise upon International Law, but an attempt to stimulate and assist reflection on its principles.' It is, in fact, a series of essays upon the history of the science, and upon its leading topics, taken in their accustomed order. In such a series, the chapter on the Empire of India, valuable as it is, may perhaps be thought redundant, while, on the other hand, the work is obviously deficient in that it stops short of 'Neutrality.' Of this defect the author is fully conscious. 'Several more chapters,' he says, 'would have to be added in order to make this a complete work on the principles of International Law. My intention in planning it included one on the principles of neutrality'; and he gives us hopes of learning his views upon this subject at no distant date. In the meantime we are indebted to Professor Westlake for eleven admirable essays, dealing respectively with 'International Law in relation to law in general'; 'Theory bearing on International Law down to the Renaissance'; 'Ayala, Gentilis, and Grotius'; 'The Peace of Westphalia and Puffendorf'; 'Bynkershoek, Wolff and Vattel'; 'Principles of International Law'; 'The equality and independence of States'; 'International rights of Self-preservation'; 'Territorial Sovereignty'; 'The Empire of India'; and 'War.'

'Difficile est proprie communia dicere,' and the literature of International Law is already so enormous that there is a certain presumption against the necessity of each new treatise on the subject. But the volume before us amply justifies its existence. It is the work of an accomplished lawyer, who has long been a close observer of political events, and an independent thinker upon the problems which they suggest. One may be far from following the author in his criticism of Austin, or from sharing his views as to the relation of public to private International Law, but on these questions, as on many others which he has had occasion to discuss,

there is room for legitimate differences of opinion. The instructed reader, whether or no he always agrees with Mr. Westlake's reasonings, must always admire the easy mastery of the subject, the unostentatious learning, and the freshness of treatment, which are conspicuous in every page of the book. Many of Mr. Westlake's remarks at once arrest attention. It is, for instance, true, and has not been sufficiently noticed, that the men of the Renaissance failed to realize the inadequacy of such a scheme of International Law as they could deduce from the Law of Nature, and did not foresee the process of growth which is now, almost from year to year, so perceptible in the science. He appears, however, to overrate the extent to which the Law of Nations can be assimilated to municipal law. Although the former may be almost as well-defined and as certain in its operation as was English law in the time of Henry II, there is surely this difference between the two cases—that the English law of Henry II possessed the potentiality of being developed into the law of Victoria, while International Law can never attain to a similar development without ceasing to be itself and becoming the municipal law of a federal union of States. Bynkershoek gets an amount of notice, to which his strong personality well entitles him, but which he too often fails to obtain. There is a very interesting inquiry into the nature of those rights, such as to extradition and to the navigation of International rivers, which admittedly presuppose for their exercise conventions by which their precise limits are demarcated. It is certainly true, though often forgotten, that 'a personal union of States may grow into a real one by habit without any change of constitution,' and the statement is supported by the change which took place in the relations of England and Scotland between the reigns of James I and Queen Anne. The discussions on territorial sovereignty, on savage races, on Professor Lueder's views of the conduct of warfare, on the capture of private property at sea, are one and all deserving of careful study; as are the reasons which have obliged the author to come to the conclusion that 'pity, as an operative force in the mitigation of war, has nearly reached its limit.'

T. E. H.

[Opinions will probably differ for some time as to the value of the 'analytical' theory of law. To my mind Mr. Westlake's outspoken abjuration of it is not the least acceptable or important part of his work.—ED.]

Principles of the Law of Personal Property. By the late JOSHUA WILLIAMS. Fourteenth Edition. By T. CYPRIAN WILLIAMS. London: Sweet & Maxwell, Lim. 1894. 8vo. lxxxviii and 620 pp. (21s.)

LEGISLATION relating to the subjects dealt with in this popular work has been exceptionally active since the appearance of the last edition, and several judicial decisions (among which *Cochrane v. Moore* is probably the most important) have thrown new lights on important branches of the law of personal property. The mere bringing up to date would, therefore, in itself have necessitated a considerable amount of labour, but the learned editor has taken a stricter view of his duty, and, by the addition of new matter and a partial re-arrangement and re-construction of the former contents of the book, has greatly added to its value. Special attention has been given to the chapters relating to 'choses in possession' and to the history of the remedies for their recovery, in which the interesting researches of Mr. Justice Holmes and Professor Ames have been made available for the readers in a very compendious and lucid manner. But signs of the editor's careful

work are discernible throughout the volume, and as a result the whole subject is presented in greater completeness and in a more logical order than in the former editions.

It is possible that for this very reason occasional faults of arrangement and passages liable to be misunderstood are more noticeable, and we call attention to some of them, in the hope that in the next edition the scientific character of the work will be still more clearly accentuated than in the edition now before us.

On page 49 the cases in which ownership is severed from possession are enumerated as follows: (1) Taking or finding by an unauthorized person; (2) Bailment; (3) Lien; (4) Distress. This is misleading, because a right of lien can obviously arise in such cases only in which the possession and ownership had already become severed, and distress is an instance of involuntary loss of possession like the taking away or finding. Moreover, the case of an executed sale without immediate delivery of the goods ought to have been added.

The pledging and the mortgaging of goods should, in our opinion, be dealt with under one head. The latter subject is discussed with great elaboration on pp. 88-90, whilst the former receives rather step-motherly treatment in connexion with the subject of bailments (on p. 53).

The disabilities of infants, married women, lunatics, &c., in so far as they relate to conveyances, are mentioned on pp. 92-94, whilst their bearing on contracts is referred to on pp. 150-152. This involves a certain amount of repetition, and removes an opportunity for comparing the two sets of rules.

The provisions of the Act of 1830 (which, by the way, has ceased to be a 'modern' statute) relating to applications in respect of maintenance for infants, and the reference to the powers of management and administration under the Lunacy Act, 1890, seem rather out of place in a chapter dealing with 'Stocks, shares and annuities.'

The chapter dealing with 'Settlements' is somewhat encumbered by the mass of detail. Thus the statement on p. 362 that a person whose consent is required for an investment is 'not the sole judge of the propriety of any change of investment,' seems almost too obvious to be inserted into a text-book, and the observation on p. 377 that in the case of a voluntary settlement the solicitor ought to suggest the insertion of a power of revocation is somewhat misleading. There are many cases in which such a suggestion would be out of place, and, having regard to the provisions of the Finance Act, 1894, it might prove very expensive to the first tenant for life or to the other beneficiaries.

E. S.

A Treatise on Possession of Land, with a chapter on the Real Property Limitation Acts, 1833 and 1874. By JOHN M. LIGHTWOOD.
London: Stevens & Sons, Lim. 8vo. xvi and 342 pp. (15s.)

MR. LIGHTWOOD has done both a solid and an ingenious piece of work in this book. It will be found profitable by advanced students of the law, and the practitioner who has a difficult point arising out of possessory titles or interests will neglect Mr. Lightwood's guidance at his peril. The book is methodically arranged, and the matter is anything but diffuse; it would be unjust, therefore, to attempt a summary, and we shall mention only a few points we have specially noted.

The distinction between remedies founded on possession and remedies founded on title is well brought out. There is nothing essentially archaic

in this distinction, for it has been deliberately maintained in the modern legislation of British India. Sect. 9 of the Specific Relief Act (I of 1877) enacts as follows:—'If any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by suit instituted within six months from the date of the dispossession, recover possession thereof, notwithstanding any other title that may be set up in such suit. Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.' This essentially reproduces the relation of the assize of novel disseisin to the writ of right in medieval English law. We are not sure, however, that Mr. Lightwood does not unconsciously Romanize just a shade too much as to the 'petitory' character of the writ of right, though it would be hard to find any good exception to his actual statements of law. He misses or slurs (we are not sure which) the point that the phrase '*mere* right' not only represents a Latin *majus*—not *merum—jus*, but is identical with it, being only a corrupt version of its Old-French form.

The question of title and conflicting titles in ejectment is treated by Mr. Lightwood with much learning and subtilty. His endeavour to reconcile all the books by ascribing an operation hitherto (it would seem) undiscovered to the Real Property Limitation Act of 1833 is a feat *inter apices juris* which must command admiration even if it fails of assent. If we must choose, however, we prefer the bolder course of saying with Mr. Ames (Harv. Law Rev. iii. 325) that *Doe v. Barnard*, 13 Q. B. 945, was wrongly decided. We hold to the belief that *Asher v. Whitlock*, L. R. 1 Q. B. 1, is thoroughly sound according to both ancient and modern law, and is not to be cut down by refinements. On the other hand Mr. Ames, in the same place, appears to find the decision of the Judicial Committee in *Trustees' Agency Co. v. Short*, 13 App. Ca. 793, defensible on principle, which neither Mr. Lightwood nor Mr. Challis does. We are disposed to agree with Mr. Lightwood that even a tortious seisin in fee simple is 'not so easily got rid of as that case assumes.

The plea of *liberum tenementum* in ejectment has always been one of the puzzles of the law. Mr. Lightwood does not give what we believe to be the true solution. The plea did not on the face of it absolutely exclude a right to immediate possession on the plaintiff's part, and to that extent it was imperfect. But for that very reason it was allowed to be specially pleaded. It gave 'implied colour' to the plaintiff's claim, and so put the matter of title before the Court. Had it not 'given colour'—had it gone on, for example, to deny categorically that the plaintiff had any sort of title or claim to enter—it would have been bad as amounting to the general issue.

F. P.

A Commentary on the Sale of Goods Act, 1893, with illustrative cases and frequent citations from the text of Mr. Benjamin's treatise. By WALTER C. A. KER and A. B. PEARSON-GEE. London: Sweet & Maxwell, Lim. 1894. 8vo. xliv and 380 pp. (18s.)

THE work before us is a complete and exhaustive treatise on the whole law of the Sale of Goods. Sect. 61 (2) of the recent Act expressly reserves the rules of the Common Law, including the law merchant, save in so far as they are inconsistent with its express provisions. It becomes necessary therefore to consider not merely the text of the codifying statute, but the principles derived from the mass of case-law which has grown up around

this subject. The authors of the work under review were well equipped for their task by their previous labours in the same field of law. The wealth of principle contained in 'Benjamin on Sale' has been incorporated in a clear and condensed form in the present work, and combined with a careful and critical interpretation of the text of the Act. Great industry and skill have been shown in examining the statutory law on the Sale of Goods which has been re-enacted in the present Code, such as the so-called section 17 of the Statute of Frauds, sections 8 and 9 and other portions of the Factors Act, 1889, and various statutory regulations regarding the re-vesting of stolen property. A useful summary is given on pp. xliii and xliv of the effect of the new Act on the previous law by alteration or addition. The authors have not shrunk from expressing bold but carefully-considered opinions upon difficult and doubtful points; thus on p. 33 they criticize the difficulty of the distinction drawn by the C. A. between the recent case of *Taylor v. Smith*, '93, 2 Q. B. 65, and *Kibble v. Gough*, 38 L. T. N. S. 204, and *Page v. Morgan*, 15 Q. B. D. 228, as to what is a sufficient act of acceptance to constitute a recognition of a pre-existing contract of sale, apart altogether from the question of acceptance in performance of the contract. We have endeavoured in many ways to test the accuracy of the book, and have failed to find matter for adverse criticism. The law of the Sale of Goods is sometimes now prescribed as a special subject for examination by the Inns of Court, the Universities, and the Civil Service Commission. The present work would form an excellent text-book for fairly advanced students. Its chief value, however, will consist in its being a standard work of reference for the profession, containing, as it does, a full exposition of almost every point which is likely to arise in connexion with the subject-matter with which it deals.

S. H. L.

A Students' Manual of English Constitutional History. By D. J. MEDLEY. Oxford: B. H. Blackwell. 1894. 8vo. xxiii and 583 pp.

THIS book is what it professes to be, a compendium to be used by teachers and students; the author starts no theory of his own, and he is almost too careful to avoid the reproach of fine writing. He has given us, not a continuous narrative, but rather a history of institutions, in which the parts of our government are taken up one by one for historical description. Speaking generally, the book is accurate, trustworthy, and well adapted to the purpose which it is intended to serve. We note here and there some of the small errors which no author escapes in his first edition. The Lord President of the Council and the Lord Privy Seal are not 'necessarily' members of the House of Lords (p. 100). Lord Wensleydale was not 'childless,' though he had no son (p. 105). The potwaller surely boils his pot within his own walls, not 'in the streets' (p. 175). The Court of Chancery did not take 'appeals' from the Courts of Common Law (p. 340). The Church of England is not a Corporation (p. 510), but a society including many corporations. These are only such slips as any layman may make in writing on a legal subject; they do not seriously impair the value of the book. On p. 134 we may observe that Mr. Freeman's doctrine as to privilege of peerage is somewhat too strongly expressed. 'The peer was great and powerful because he was a member of a great and powerful assembly'—and also because he was a hereditary councillor of the Crown, who retained his privilege and might offer his advice even when Parliament was not sitting.

T. R.

1. *The Finance Act, 1894*, so far as it relates to the Death Duties, and more especially the New Estate Duty. By JOHN EUSTACE HARMAN. London: Stevens & Sons, Lim. 1894. 8vo. xi and 194 pp. (5s.)
2. *A Guide to the New Death Duty*, chargeable under Part I of the Finance Act, 1894. By EVELYN FREETH. London: Stevens & Sons, Lim. 1894. 8vo. vi and 187 pp. (7s. 6d.)

THERE are two forms of ingenuity which will be brought into full play by the Finance Act, 1894. One is the ingenuity of interpretation—the judicial acumen which will have to say what the Act upon the Statute Book means. The other is the ingenuity of evasion—the art which will be invoked to escape the Act. We do not believe that testators will find many devices to help them out of the meshes of the wide net thrown by Sir William Harcourt. For the new Act is modelled upon the Succession Duty Act, which has stood the test of forty years' experience. If Mr. Harman had been able to devise a way out of the Act, his book would have its fortune made. As it is, it is a useful and carefully-written guide to one of the most difficult Acts which has ever received the Royal Assent. The Bill originally put forward was, we believe, one of five clauses only, and a marvel of ingenuity in the accursed way of legislation by reference. Read in this connexion a fraction of sect. 2 of the Act, sweeping in as property which is to be deemed to pass upon a death 'property which would be required on the death of the deceased to be included in an account under sect. 38 of the Customs and Inland Revenue Act, 1881, as amended by sect. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words "voluntary" and "voluntarily" and a reference to a "volunteer" were omitted therefrom.' Well might Mr. Balfour remark that this is as if one were to read the Ten Commandments with the word 'not' omitted and all reference to a Supreme Being eliminated. It is a shameful way of legislating, and we do not believe it is necessary. While it is followed, the labours of many commentators will be needed. Mr. Harman's handbook will be found an unpretentious and a thoroughly serviceable companion. It contains all the rules and forms which have emanated from Somerset House, some of them perhaps being—low be it spoken—*ultra vires*. Mr. Freeth's book also is a convenient manual. But in our judgment it is a mistake of his to disregard the numerical order of the sections and to rearrange the new Act according to his own lights. Arbitrary as are the divisions of the Act, lawyers have to conform and to thread their troubled way through its mazes as best they can. With Mr. Freeth's thread in their hands they may be materially helped. But neither his index nor his text leads us to a fact which a denizen of Somerset House might surely have given if Mr. Harman could give it: Mr. Freeth might have told us, as Mr. Harman does, that in the forms of affidavit for probate it is not intended to insist on the statements which are ostensibly required as to property of which the deceased was trustee. This requirement was not in the Act itself, but was of Somerset House alone, and it was a needless and an impracticable requirement which ought never to have been made.

The Shipping Code, 1894. By ALEXANDER PULLING. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. La. 8vo. xxxviii and 414 pp. (7s. 6d.)

THE primary object of this work is to give a ready means of ascertaining the place and form in which each section of the repealed Merchant Shipping Acts is to be found in the consolidating statute, the Merchant Shipping Act, 1894. This object is carried out by an elaborate, but simple and effective, system of notes and tables. The work is not an ambitious but is a necessary and useful one. Statutes such as the Merchant Shipping Act, 1854, with its attendant series of amending, supplemental, and additional Acts, will long continue to be part of the necessary equipment of every mercantile lawyer's chambers, notwithstanding their repeal by the existing Act; and it is absolutely necessary to have a ready means of referring from the one to the other. Mr. Pulling's book is the first in the field, no time having been lost in producing it since the 25th of August last, the day of the passing of the Consolidating Act. For this reason, probably, the book does not contain much that will assist the practitioner in ascertaining the construction and effect of the Act, beyond what may be learnt within the four corners of the Act itself. A few cases are referred to, and there is a table of cases; but the table occupies no more than two pages, and many of the cases cited relate to the very special and intricate subject of compulsory pilotage. A work upon the Merchant Shipping Act similar to 'Shelford's Real Property Statutes,' or 'Morgan's Chancery Acts and Orders,' is what is wanted, and what we have never had; meanwhile Mr. Pulling's book holds the field. A second edition will perhaps supply what it would have been impossible in two months to have given in the first. The Introduction to the present volume contains what is not elsewhere to be found, namely, a statement of the legislation upon Shipping prior to 1854. This statement, which does not profess to be more than a sketch, covers eight pages only; but, so far as we are aware, no other eight pages give so good a general description of the legislation which occupies a very large part of the statute book. The existing Act alone runs to 748 sections; and it by no means exhausts the subject. Harbours, River Conservancies, Docks, Bill of Lading, Scotch Fishing Boats, Chain Cables, Admiralty Jurisdiction, Prize, and many other kindred subjects, find no place in the work before us for the reason that they are excluded from the Merchant Shipping Act.

One word as to the effect of so-called consolidating statutes. Mr. Pulling states in his Introduction that 'the authority of the decisions on the construction and application of the repealed Acts remains unimpaired, and they will have legal force in interpreting the sections which reproduce those on which they were originally pronounced.' This statement we think too wide. A decision of the Court of Appeal given almost on the day Mr. Pulling's book came to our hands, as to the effect of the County Courts Act, 1888, shows that consolidation Acts sometimes do more than their framers presumably intended them to do. We doubt whether there ever was a consolidating Act that left the law exactly where it was before.

We also have from the same author and publishers an annotated edition of the Act of 1894 (La. 8vo., viii and 414 pp., Comparative Table of Acts and index unpagged, 6s.), which is practically a cheaper issue of the same work, with a few omissions.

The Law of Waste. By WYNDHAM ANSTIS BEWES. London: Sweet & Maxwell, Lim. 1894. 8vo. xxxvii and 450 pp.

THERE are perhaps no questions occurring in practice that are more difficult to answer than questions on the law of waste. The difficulty arises in part from the fact 'that there is no book of modern times which deals at all exhaustively with the subject;' and the object of this book is to obviate this difficulty. While the author has not written a treatise on the antiquities of the law, he has wisely given a certain prominence to cases decided on the old statutory law of waste, with the intent that the practitioner who has occasion to refer to the older law may avoid the pitfalls incident to this very technical action and its forms of pleading.

The book commences with a discussion of the old statutory and common law remedies for waste: then follows discussion of the nature of waste, of waste in timber trees and underwood, of mines, minerals and fixtures, of the meaning of 'justifiable waste' 'without impeachment of waste,' and 'equitable waste.' The author then deals in an exhaustive manner with the questions arising where waste has occurred, viz. who is entitled to the proceeds of waste, and what are the rights of the parties where permissive waste has taken place. Then he deals with waste by particular persons, and the effect of conveyances; and, lastly, he discusses points of practice and the effect of delay.

The practitioner will find this book very useful, as all the cases are collected and discussed.

Principles of the Law of Interest. By SIDNEY PERLEY. Boston, U.S.A.: G. B. Reed. 1893. La. 8vo. xiii and 433 pp.

WITHIN the necessary limitations of his topic Mr. Perley has evidently expended much research and care, and his work will doubtless afford a considerable saving of labour to the practitioner. But, while there is much in this direction to commend, we cannot say that he is equally successful in the logical treatment of his subject. His book is indeed rather a digest than a treatise, and the 'principles' as developed by him are either too general or too fragmentary to make his presentation of the subject a final one, or in point of method fairly up to the mark.

As a digest it is also open to some criticism. Too frequently cases are brought together under one head which have merely a nominal connexion. Thus under the title 'Judgments,' mainly dealing with interest on judgments, are found divers cases of interest included in judgments, which properly relate to the commencement of the action and to the varying causes for which suit may be brought.

Headings or captions are used with commendable frequency; but the classification is too often trivial.

We must also except to the citation of cases by page and volume merely; especially where, as here, the abbreviations are considerable. The slightest inaccuracy in a figure may lose the citation entirely. Nor does the useful addition of the year fairly compensate for this defect. Horace's '*brevis esse laboro obscurus fio*' is a wholesome warning.

There is a brief but interesting historical *résumé*, at the beginning of the work, of the scriptural and medieval view of interest—then called usury. There is, however, singularly, no reference to the most important text, on which was founded the prohibition by the Church, and, consequently, by the mercantile world, from taking any interest upon a mere money loan. We

refer to Luke vi. 35, where, as Dr. Döllinger has shown, the mistranslation in the Vulgate of the Greek ἀπελπιζοντες into 'nihil inde sperantes,' instead of 'nihil desperantes' (i. e. without fear of loss), changed the Saviour's injunction of willingness to lend into a prohibition to take any usura, or use (whence usury) from the loan. And this was logically worked out by the scholastic reasoning of Aquinas, whose doctrine, that money was incapable of usufruct, is echoed in the Shakespearian phrase, 'a breed of barren metal.'

An Election Manual for Parish Councillors, Urban and Rural District Councillors, and Guardians outside London. By WALTER C. RYDE. London: Reeves & Turner. 1894. 8vo. xl and 340 pp. (7s. 6d.)

THIS manual contains the text of the Orders of the Local Government Board which regulated the elections in 1894, together with the incorporated enactments relating to Corrupt and Illegal Practices, except the sections which deal with election petitions. There is a good introduction, and the Orders are abundantly annotated. The notes are for the most part clearly and carefully written, and the numerous references to cases decided on the interpretation of rules for other elections have been judiciously used.

In several instances the notes are not quite accurate. For instance, at page 10 it is erroneously stated that a person who holds any paid office under a Parish Council is disqualified for being elected a District Councillor, whilst it is not stated that a candidate is disqualified by being concerned in any contract or bargain with the Council. We have sought in vain for any statement that the register of electors is conclusive except in the case of prohibited persons; and at page 264 the author appears to confuse prohibition from voting with disqualification for being registered. The distinction is of practical importance, for whereas the register is conclusive as to disqualification, a prohibited person cannot vote although his name is on the register. It is doubtful whether the receipt of medical relief prevents a person at all from voting, but, if it does, it surely is by way of disqualification and not of prohibition (see *Stowe v. Jolliffe*, L. R. 9 C. P. 734). The author is, we think, wrong in including this among the grounds of prohibition.

Would it not have been well to state in the introduction or preface, or, better still, on the title-page, that the Orders on which the book is founded were applicable only to the elections held last December?

A Handy Guide to the Licensing Laws. By H. W. LATHOM. London: Stevens & Sons, Lim. 1894. 8vo. xxii and 149 pp. (5s.)

THIS book is intended as a pocket *vade mecum* for those having business connected with the licensing laws. The paragraphs are arranged dictionary-wise, under such headings as 'Music and Dancing'—'Name on Premises'—'Neglect to Apply'—'Notices,' &c. The author has very skillfully compressed a great deal into a small compass, and persons having to do with public-house property, otherwise than as legal advisers, would find this book not only useful, but sufficient; while even professional advocates will be able by its means to refurbish their arguments or find sheltering fence in easy rapid glances. The following paragraph indicates Mr. Lathom's style: 'It is no offence if customers call for liquors to carry away after closing hours if purchased before' (p. 51). This bald general statement, though correct, needs to be marked 'with care.' The leading case, *Brewer v. Shepherd*,

36 J. P. 373, refers, it will be remembered, to a man who bought his beer and then went to be 'shaved,' and fetched it after closing time. This case, by the bye, though quoted on another point, is not cited by the author in this connexion at all.

Referring to section 9 of the Act of 1874, which provides a penalty on a person who 'during the time at which premises for the sale of intoxicating liquors are directed to be closed sells or exposes for sale,' &c., Mr. Lathom at p. 51 has the following: 'This does not apply to the sale of intoxicating liquors by wholesale' (sect. 72 of the Act of 1872). This is also undoubtedly a true statement, but there is nothing to prevent any publican selling a wholesale quantity.

If the two propositions quoted hold good without any limitation—and no limitation is suggested by the author—a man might buy five gallons (wholesale) during close time, and, leaving it at the tavern, might fetch it away in pints during close time on Sunday afternoons.

The Brehon Laws: a Legal Handbook. By LAURENCE GINNELL.
London: T. Fisher Unwin. 1894. 8vo. vii and 249 pp.

THIS volume appears to consist of lectures delivered before the Irish Literary Society in London. On that occasion, as the author tells us, he was congratulated by one friend on his choice of subject, and commiserated by another on the uninteresting nature of that subject. So the author respectfully dedicates his volume to those two friends; and on the whole we fear that he will disappoint both. In fact, he seems to have been himself haunted by the same notion, as we learn from what in any other book would have been the preface to its contents. Here, however, it forms the end of the last chapter, which he has been pleased to call his 'Conclusion'; and there he speaks as follows: 'If any one should open this little book with great expectations he will close it with disappointment correspondingly great. I have neither treated the whole subject descriptively, nor entered into an exhaustive criticism of any part of it. . . . My aim is to interest the general reader, to put within the reach of all who desire some knowledge of those laws a convenient synopsis of their leading features, with some corrections of current errors, and, above all, to induce some student better equipped than I to undertake a thorough examination of those laws, and treat the world to a work really worthy of the subject, and calculated to take the wind completely out of my small sail.'

Mr. Ginnell's modesty is calculated to mollify the heart of the severest critic, and let us hope that his book may interest the general reader; but we must candidly confess to some doubt as to the utility of a book on the Brehon Laws to interest the general reader, if there be such a strange entity. For anybody else we think it will still be better to read M. d'Arbois de Jubainville than Mr. Ginnell. In the first place we are not favourably impressed by the ready reception which he gives to certain uncritical opinions as to the early history of the Irish people: such a statement as the following is calculated to make anybody except the general reader pause: 'Many leading facts of Irish history have been quite satisfactorily ascertained to the extent of three hundred years before Caesar's time.' The same may be said of his words about the Brehon Laws, when he writes: 'Needless to say they were not written in a foreign tongue. No foreign mind conceived them. No foreign hand enforced them. They were made by those who, one would think, ought to make them: the Irish. They were made for the benefit of those for whose benefit they ought to have been made: the Irish.'

Hence they were good ; if not perfect in the abstract, yet good in the sense that they were obeyed and regarded as priceless treasures, not submitted to as an irksome yoke.' There were doubtless those who valued the Brehon Laws, but what do we know of the feelings of the masses with regard to them ? Even according to Mr. Ginnell's own admission they formed the *Feineachus* written in the language of the *Feini* ; but who were the *Feini* ? In any case there is no reason to suppose that they were the only people of ancient Erin ; and anybody who has given the matter a thought is forced to admit that it had at least two different peoples, the aborigines and their Celtic conquerors and rulers. It is useless, however, to dwell on matters of this kind, as the author seems to have read nothing written in recent years on questions of ethnology. And as regards the question of language, he is no better situated, though he feels duly 'grateful to the learned men who have surmounted the difficulties' of the text of the Brehon Laws. He can hardly be aware how much remains to be done in that direction, and when he ventures to touch on matters of philology himself the result is not encouraging. Although his grasp of the questions of race and language is feeble, there are a thousand and one other questions suggested by the Irish laws which he might have discussed ; but one looks for that in vain. The most readable portions of the volume are beyond doubt the telling digressions in which he attacks English rule in Ireland from the time of Elizabeth down : he is at his best when he has somebody to assail.

Über die Leges Anglorum saeculo XIII ineunte Londoniis collectae.

F. LIEBERMANN. Halle: 1894.

Über Pseudo-Cnut's Constitutiones de Foresta. F. LIEBERMANN.

Halle: 1894.

THOUGH the field in which Dr. Liebermann is labouring lies remote from the interests of English legal practitioners, he must not be allowed to suppose that they do not admire his work. Gradually by one pamphlet after another he is reconstructing a chronicle of what was until lately the darkest age in the history of our law, namely, the age which immediately followed the Norman Conquest. It will be well known to most of us that the age in question is represented to us by several treatises, or attempts to write treatises, which bear such titles as *Leges Willelmi* and *Leges Henrici Primi*. Before Dr. Liebermann turned to his task we used to see these things standing at the end of the Record Commissioners' edition of our Ancient Laws and Institutes, or at the end of Schmid's *Gesetze*, and perhaps we used to wonder whether any one would ever explain to us their origin and their nature. And now Dr. Liebermann is slowly unfolding an intricate story. He is showing us how so soon as order was established in England, men set to work upon the laws of the West-Saxon kings and the laws of Cnut, and tried to make them intelligible, and, as we should say, to bring them up to date, translating them into Latin but modifying them, sometimes honestly, sometimes dishonestly ; for some of them were honest, if rather stupid, antiquarians ; others were, according to their own lights, constructive jurists, bent on rationalising the traditional materials ; while others again were no better than forgers, who were concocting ancient law in the interest of a class or of a theory. The tale is complicated by the literary communism or 'collectivism' of the age. Each man takes what he wants from the common store, tampers with it and makes it his own, and yet not his own, for as he has served his predecessors so he will be served in his turn.

The two last of Dr. Liebermann's pamphlets deal with two treatises in which interested forgery predominates, and the manner in which their true character is exposed is worthy the study of all those who can relish a fine piece of cross-examination. First, we have a large law-book which has worked up into itself a great deal of the existing legal materials, but has stuffed them with interpolations which glorify that colony of Troy town, the City of London, head of the realm and of the laws. Then we have a set of forest laws ascribed to Cnut, but really, so thinks Dr. Liebermann, manufactured in the last years of Henry II. With the sagacity of those marvellous trappers whom we used to know in our youth, the critic tracks his prey. Every blade of grass teaches him something. It is beautiful work and, so far as we can judge, it is sound work, such as could be done only by a man who knows the England of the twelfth century through and through, and whose ingenuity is the servant of his profound knowledge.

We have also received :—

Adulteration (Agricultural Fertilisers and Feeding Stuffs). By FRANCIS H. CRIPPS-DAY. London: Stevens & Sons, Lim. 1894. 8vo. xii and 140 pp. (5s.)—Specialization could hardly be carried farther than in the present volume, which deals with the law of adulteration only so far as affects agricultural fertilisers and feeding stuffs. The short Act (57 & 58 Vict. c. 56) relating to this question is set out in the text with copious notes. Where similar words in similar Acts have been judicially construed, as in the cases on the meaning of the words 'to the prejudice of the purchaser' and 'food' in the Food and Drugs Act of 1875, the decisions are cited and discussed. Great pains have been taken in collating the laws which are in force on the subject in America and in many parts of the Continent.

The work does not profess to deal in more than an elementary fashion with the agricultural, mercantile, scientific, and legal sides of its subject-matter, but it will be of much service in putting those who are concerned with the practical administration of the Act on the right track.

Fertilisers and Feeding Stuffs. By BERNARD DYER. With the text of the Fertilisers and Feeding Stuffs Act, 1893, and Notes by ALEXANDER J. DAVID. London: Crosby Lockwood & Son. 1894. 8vo. viii and 122 pp. (1s.)

Handbook of certain Acts affecting the Universities of Oxford and Cambridge and the Colleges therein. By W. B. SKENE. London: Sweet & Maxwell, Lim. 1894. 8vo. 140 pp. (7s. 6d.)—Mr. Skene has collected in one volume the Universities and Colleges Estates Acts and other enactments relating to the same subject; the few cases illustrating this branch of the law are duly noted, and some useful forms are added in an Appendix. The work is intended as a supplement to Griffiths' 'Enactments in Parliament.' It should prove useful to Bursars of Colleges and their legal advisers.

Inebriety or Narcomania. By NORMAN KERR, M.D. Third edition. London: H. K. Lewis. 1894. 8vo. xxxix and 780 pp. (21s.)—We noticed this work with approval in its earlier editions (L. Q. R. iv. 353; v. 435). The present edition is equally worthy of commendation. The work has been almost entirely rewritten. The new matter contains chapters on

etheromania in Ireland, inebriety and insurance, and the sequestering of habitual drunkards. We commend this treatise to all who are interested in the medical jurisprudence of inebriety.

The Lawyer's Companion and Diary for 1895. Edited by E. LAYMAN. London: Stevens & Sons, Lim., and Shaw & Sons. 1895. 8vo. 191 and 638 pp. (5s.)—This handy work contains, in addition to the usual 'Law List' information, tables of Costs, of the new Stamp Duties, the principal practical Statutes, and the Public Statutes of 1894. There is also a synopsis of statutory County, Local Government, and Parish business.

Sweet and Maxwell's *Diary for Lawyers* (edited by F. A. STRINGER and J. JOHNSTON. London: Sweet & Maxwell, Lim. 1895. 8vo. 396 pp. 3s. 6d.) contains much the same general information as *The Lawyer's Companion*—with the important exception that the *Diary for Lawyers* is not, like *The Lawyer's Companion*, also a Law List.

Nos. 6 and 7 of 'The Annotated Acts' (London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim.). *The Building Societies Act, 1894*, with Introduction and Index by W. F. CRAIES. 8vo. ix and 24 pp. (1s. net); *The London Building Act, 1894*, with Introduction, Notes, and Index by W. F. CRAIES. 8vo. ix, 121 and 28 pp. (3s.)

The Revised Reports. Edited by Sir F. POLLOCK, assisted by R. CAMPRELL and O. A. SAUNDERS. Vol. XVI. 1815-1817 (4 & 5 Dow; 2 Mer.; 1 Madd.; 3 & 4 M. & S.; 6 Taunt.; 1 & 2 Price; 4 Camp.). London: Sweet & Maxwell, Lim.; Boston (Mass.): Little, Brown & Co. 1894. La. 8vo. xvi and 843 pp. (25s.) Vol. XVII. 1816-1817 (3 Mer.; 2 Madd.; 5 M. & S.; 7 Taunt.; 2 Marsh.; 3 Price; Holt, N. P.) La. 8vo. xv and 714 pp.

The Law relating to Children . . . including the complete text of 'The Prevention of Cruelty to Children Act, 1894,' with Notes and Forms. By W. CLARKE HALL. London: Stevens & Sons, Lim. 1894. 8vo. xvi and 184 pp. (4s.)

A Digest of the Criminal Law. By the late Sir JAMES FITZJAMES STEPHEN, Bart. Fifth Edition by Sir HERBERT STEPHEN, Bart., and H. L. STEPHEN. London: Macmillan & Co. 1894. 8vo. xlvii and 488 pp. (16s.)

The Law of Eminent Domain in the United States. By CARMAN F. RANDOLPH. Boston: Little, Brown & Co. 1894. La. 8vo. cxxv and 462 pp.—Review will follow.

The Merchant Shipping Act, 1894, with Notes, Appendices, and Index. By JAMES DUNDAS WHITE. London: Eyre & Spottiswoode. 1894. 8vo. xvi and 628 pp. (7s. 6d.)

The Statutes of Practical Utility . . . arranged, with notes thereon, by J. M. LELY. Vol. 3, Part iv. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1895. 8vo. viii and 745-1658 pp. (20s.)

A Handbook of the Law of Defamation and Verbal Injury. By F. T. COOPER. Edinburgh: W. Green & Sons. 1894. 8vo. lxxvi and 319 pp. (14s. net.)

Commentaries on the Law of Persons and Personal Property. By THEODORE W. DWIGHT. Edited by EDWARD F. DWIGHT. Boston (Mass.): Little, Brown & Co. 1894. La. 8vo. lxii and 748 pp. (\$6.00 net.)

Ruling Cases. Edited by R. CAMPBELL. With American Notes by IRVING BROWNE. Vol. II. Act—Ame. London: Stevens & Sons, Lim.;

Boston (Mass.): The Boston Book Co. 1894. La. 8vo. xxx and 791 pp. (25s.)

A Compendium of Sheriff Law. By P. E. MATHER. London: Stevens & Sons, Lim. 1894. 8vo. xlviii and 578 pp. (25s.).—Review will follow.

The Study of Cases. A course of instruction in reading and stating reported cases, composing head-notes and briefs, &c. By EUGENE WAMBAUGH. Second Edition. Boston: Little, Brown & Co. 1894. (\$2.50 net.)

A Treatise on the Law of Res Judicata. By HUKM CHAND. London: W. Clowes & Sons, Lim.; Edinburgh: W. Green & Sons. 1894. La. 8vo. xx, 764, 38 and 23 pp.

Concise Precedents in Conveyancing. By M. G. DAVIDSON. Sixteenth Edition. London: Sweet & Maxwell, Lim. 1894. 8vo. xxxv and 895 pp. (21s.).

Natural Rights: a criticism of some political and ethical conceptions. By DAVID G. RITCHIE. London: Swan Sonnenschein & Co. 1895. 8vo. xvi and 304 pp. (10s. 6d.)

Des Contrats par correspondance. Par JULES VALÉRY. Paris: Thorin et Fils. 1895. 8vo. xvi and 461 pp.

The Law and Practice relating to Writs of Summons. By W. G. CLAY. London: W. Clowes & Sons, Lim. 1894. 8vo. xxxii and 231 pp.

*The Editor cannot undertake the return or safe custody of MSS.
sent to him without previous communication.*

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NOTES.

MR. GEORGE H. SMITH of Los Angeles, California, has done me the honour of devoting an article in the *American Law Review* to my introductory chapter on 'The Nature and Meaning of Law,' published in this REVIEW last July, and expressing regret that I have not solemnly recanted the errors of the Austinian school and undertaken an express refutation of them. As to the first point, I have nothing to recant. More than twenty years ago I published an article against the Austinian definition of law; it was naturally not what I should write now, and therefore I purposely do not give the reference to it, but I still regard it as nothing worse than immature. As to the second point, the best way of refuting an erroneous system is to show that one can do better without it. Again, although I cannot accept Austin's philosophy of law, yet I consider him entitled to an honourable place in the history of the science of politics, for the reasons I have stated in my little book on that subject. Mr. Smith seems to think there is such a thing as a generally accepted doctrine of the Law of Nature, and that it is fairly well settled and easily known. My own reading of modern jurists and philosophers has not exactly led me to that conclusion.

F. P.

No principle of private international law as understood in England is better established than that, to use the words of Mr. Westlake, 'all questions concerning the property in immoveables, including the forms of conveying them, are decided by the *lex situs*.'

Yet the two recent decisions—*In re Piercy*, '95, 1 Ch. 83, 64 L. J. Ch. 249, and *Mayor of Canterbury v. Wyburn*, '95, A. C. 89; 11 R. Feb. 89—throw doubt, not on the principle itself, but on the extent of its application.

1. *T*, an English testator domiciled in England, leaves land in Italy to English trustees upon trust for sale and conversion, and to hold the same until conversion, and the proceeds of the sale

after conversion upon certain trusts (*inter alia*) for his children during their respective lives, with remainders to their respective issue. These trusts are to a great extent invalid under Italian law as regards land in Italy (see *Codice Civile*, Arts. 8, 9, 12, 899, 900), which indeed apparently aims at the abolition or non-recognition of all trusts. The trustees under T's will have sold part of the lands. It is held by North J. that the trustees are bound to sell the land, that the proceeds of the sale must be held by them upon the trusts declared by the will, but that the rents of the unsold land must devolve according to Italian law. This is the effect of *In re Piercy*; the principle of the decision apparently is that Italian land devolves in accordance with the law of Italy (*lex situs*), but that English trustees of Italian land, if not forbidden to sell it by Italian law, must deal with the proceeds of the land in accordance with the law of England, even if the result is to carry out trusts which the law of Italy does not recognize, or even forbids.

2. T, domiciled in Victoria, bequeaths £10,000 to trustees in England on trust to purchase English land for a charitable purpose. It is held by the Privy Council that the bequest of money by a person domiciled out of England for the purchase of land in England is not affected by the Mortmain Acts, 9 Geo. II. c. 36, and 51 & 52 Vict. c. 42, though the trustees in effecting the purpose must comply with all the provisions of English law in respect of such purchases. This is the effect of *Mayor of Canterbury v. Wyburn*, which is supposed by the Privy Council to be supported by *Att.-Gen. v. Stewart*, 2 Meriv. 143, and not to be inconsistent with the decision of the House of Lords in *Att.-Gen. v. Mill*, 2 Dow & Cl. 393. The doctrine of the Privy Council appears in short to be that the Mortmain Acts, as far as they refer to moveables, affect simply the right of bequest, a matter which is governed by the *lex domicilii*, and therefore have in so far no application to the wills of persons domiciled out of England, though all questions regarding the purchase of English land—e.g. with regard to the purposes for which it can be legally purchased, or the persons who are capable of holding it—must be determined in accordance with English law (*lex situs*).

The judgment of the Privy Council in *Mayor of Canterbury v. Wyburn* is open to several observations.

First. It is in no degree supported by *Att.-Gen. v. Stewart*, which decides that the Mortmain Acts do not extend to lands out of England, and does not decide that the Mortmain Acts do not extend to foreign wills with regard to the purchase of lands in England.

Secondly. The judgment of the Privy Council is opposed to the judgment of the House of Lords in *Att.-Gen. v. Mill*, as understood by every writer of authority, including Story, Lord St. Leonards, and Westlake, who has commented upon the case since it was decided in 1831. The contradiction is avoided only by the bold assumption that the Privy Council, more than sixty years after a judgment was given, knows the facts of the case better than did Lord St. Leonards, who was alive at the time when the House of Lords delivered their judgment, and who, to judge from his language, may have been of counsel in the case (see Sugden, *Law of Property*, p. 419).

Thirdly. The judgment of the Privy Council leads apparently to this result, namely, that a devise by *T* domiciled in Victoria of lands in England for a charitable purpose comes within the Mortmain Acts, but that a bequest by *T* domiciled in Victoria of £10,000 for the purchase of the same lands in England for the same charitable purpose does not come within the Mortmain Acts.

[The learned contributor of this note is one of the few persons thoroughly qualified to criticize the opinion of the Judicial Committee. Still it seems a tenable position that in the early part of this century the *lex situs* got rather more than its fair share, as witness the notable and much discussed case of *Doe d. Birtwhistle v. Vardill* (9 Bli. N. S. 32, 7 Cl. & F. 895). The present decision is of course not binding on any Court outside the colony of Victoria, but it does not seem likely that a stronger Court can be brought together to reconsider the point in our time, either in the Judicial Committee or in the House of Lords.—F. P.]

North-Western Bank v. Poynter, '95, A. C. 56, will convey nothing new to English lawyers, but the decision is useful as establishing a uniform rule for Scottish and English commercial law on a point where there is no rational ground of difference. That a bailor may hold by way of under-bailment for a limited purpose from his own bailee was well settled in England. The contrary decision reversed by the House of Lords appears to have proceeded on a too literal following of general expressions in text-books received in Scotland as authoritative.

Hanfstaengl v. Baines, '95, A. C. 20, 64 L. J. Ch. 81, brings us to the end of the 'Living Pictures' litigation. The decision of the Court of Appeal is affirmed on substantially the same grounds, and the House of Lords has most wisely refrained from attempting to lay down any new general rule of law. Questions of 'mixed fact and law' tend sooner or later to produce rules of pure law, but it is important that this should not happen prematurely. All the

trouble about employers' liability has arisen from one or two decisions on particular facts being made the starting-point for a line of rigorous deduction.

Those who are interested in international copyright will observe that the decision in *Fishburn v. Hollingshead*, '91, 2 Ch. 371, 60 L. J. Ch. 768, which was much discussed at the time, but not appealed from (see L. Q. R. viii. 1), is now disapproved of by the Court of Appeal: *Hanfstaengl v. American Tobacco Co.*, '95, 1 Q. B. 347. The result is that the owner of English copyright in a work of art (or, it should seem, any other subject of copyright) produced abroad need not register in England as a condition precedent to suing for an infringement.

The case of the *Corporation of Bradford v. Pickles*, '95, 1 Ch. 145, 64 L. J. Ch. 101, C. A., is an important commentary on *Acton v. Blundell*, 12 M. & W. 324, and *Chasemore v. Richards*, 7 H. L. C. 349. The waterworks belonging to the Corporation of Bradford, which supplied the town, obtained their supply from certain springs adjoining the land of the defendant. The defendant threatened, avowedly for the purpose of drainage, to make tunnels which would intercept the water percolating through his land and the result of which would be to render the springs inadequate if not useless. The plaintiffs alleged, and the Court assumed for the purpose of dealing with the point, that this was done with the object of forcing them to buy the defendant off. It was decided not only that the defendant had a right to make these tunnels, but that his objects and motives were immaterial. The dictum of Lord Wensleydale in *Chasemore v. Richards* was approved by the Lords Justices Lindley and A. L. Smith. 'An intent to coerce another to purchase his land even at his own price cannot, it seems to me, be held to be a malicious intent to injure that other. It is in reality an attempt to benefit himself. But even if this were otherwise, such a doctrine has no place in the Common Law of England' (per A. L. Smith L.J., '95, 1 Ch. at p. 166). Lord Herschell did not commit himself so far, only pointing out that the defendant's intention to exercise his legal rights for his own profit could not be called malicious. The result, however, is to throw an almost conclusive weight of opinion into the scale against the Roman and Scottish doctrine that *animus vicino nocendi*, if found as a fact, can make a difference in such cases.

In imperial Rome the young nobles amused themselves by knocking peaceful citizens down in the streets and then tendering them the legal compensation in sesterces. It would, however, be

a misfortune if it were supposed that people in this England of the nineteenth century could break the law because they can afford to pay for the breaking of it. *Shelfer v. City of London Electric Lighting Company* ('95, 1 Ch. 287, 64 L. J. Ch. 216, C. A.) is therefore a noble vindication of the right to an injunction. The poor man is not to be compelled to sell his wrong to his rich neighbour, but is it very cynical to suppose that every publican suffering from the vibration of electric light machinery has his price? Has his bar such a *pretium affectionis*? The real advantage of an injunction over a money compensation is that the publican is master of the situation, and can dictate his own terms to the nuisance-maker instead of the damages being assessed by the Court. Still *Fiat justitia*. These tyrannical corporations

‘do bestride the world
Like a colossus, and we little men
Walk under their huge legs.’

Let them learn the law in all subjection.

The Court will not make wills for the people any more than contracts, but in what is known as the *cy-près* doctrine the Courts have gone a long way in that direction. Theoretically the Courts are consistent. They only purport in the *cy-près* cases to execute the intention of the testator—a general charitable intention which they discover independent of the particular object pointed out. But when a testator bequeaths a legacy to a particular college for the education of priests in the diocese of Winchester, when he goes on to ask that masses may be said yearly for the rest of his soul by the members of the said college, as he did in *In re Rymer* ('95, 1 Ch. (C. A.) 19, 64 L. J. Ch. 86), he localizes the institution, and the fair inference is that he means to give his money to that institution and to no other, and if the institution has ceased to exist at his death the legacy lapses. In the *cy-près* doctrine the Court is being generous at the expense of the next of kin or residuary legatee, but such generosity may be set off against the narrow intolerance of the Mortmain Acts, which have defrauded charities of innumerable gifts.

The Yorkshire Relish case, *Powell v. Birmingham Vinegar Brewery Co.* ('94, 3 Ch. (C. A.) 449), decides nothing new, but it is useful as impressing once more on the commercial conscience the principle of English law, that, trade mark or no trade mark, you must not pass off your goods as the goods of another man. The desire to share in another's prosperity is a natural desire which extends from legacy hunting to petty larceny. In *Powell v. Birmingham Vinegar Brewery Co.* it took the form of a desire to share the benefits of the

well-known Yorkshire Relish. Yorkshire Relish was recently struck off the register of trade marks, and is therefore *publici juris*. But it is one thing for words to be *publici juris* and another thing for them to be used as 'catch-words' by a rival maker in a way to induce a purchaser to believe he is buying the original maker's sauce. You may use the words, the law says to the rival maker, but you must effectually distinguish your goods, *if you can*. This option resembles very much that of Portia, when she invites Shylock to take his pound of flesh but at his peril to shed a drop of Christian blood. The distinction between this case and *Reddaway v. Benham*, the 'camel hair' case (14 R. March, 205), is one that may well puzzle the honest trader.

So many businesses are now carried on by a receiver and manager that it is well their position—somewhat nebulous hitherto—should be defined, as it has been by the Court of Appeal in two recent cases—*Burt v. Bull* ('95, 1 Q. B. 276) and *Cronk v. Owen & Co.* (14 R. March, 311). A receiver and manager appointed by the Court is, it seems, in a position analogous to that of an executor or trustee carrying on a business—he is personally liable *prima facie* on his contracts. A receiver appointed under a debenture holders' trust deed, on the other hand, is a mere agent of the company, appointed by the debenture holders, and as such is not personally liable on his contracts unless he holds himself out as a principal. A receiver appointed by the Court has, however, this advantage, that in all matters of importance he can get the advice or direction of the Court. A personal liability on contracts may seem onerous, but the receiver takes the burden with the benefit. He, like a liquidator, is not a gratuitous bailee; on the contrary, his office is often a lucrative and a very desirable one where the assets are large.

In re Hamilton, Trench v. Hamilton ('95, 1 Ch. 373). The restraint on anticipation, once the married woman's charter—her safeguard against being kissed or kicked out of her property—is fast vanishing. *Cessante causa cessat et lex*, which is, being interpreted, the new woman can take care of herself. She is no longer the sweetly docile and dependent being, the clinging ivy, she used to be. The Conveyancing Act first began to tamper with the restraint. Then the Married Women's Property Act, 1893, s. 2, gave the Court power to order payment of costs out of property subject to a restraint—a power which the Court has availed itself of in several recent cases (*In re Godfrey*, 13 R. Jan. 176; *Lowry v. Derham*, '95, 2 I. R. (C.A.) 123); and now, by the Trustee Act, 1893, the Court may

impound a married woman's life interest subject to a restraint to recoup a trustee whom she has instigated to a breach of trust. Mere consent, by the way, is not instigating (*Bolton v. Currie*, '95, 1 Ch. 544, 64 L. J. Ch. 164). The time is coming when the restraint on anticipation will be as curious a relic to the historical student of the rise and progress of woman as the cucking-stool or the brank.

Our law is very jealous, and rightly, of making contracts for people, of implying conditions which the parties themselves have not expressed—a *dum casta* clause in a separation deed for instance. When husband and wife agree to say

‘farewell for ever,
Cancel all their vows,’

they have no longer any right to arrogate control over each other's conduct. If a husband thinks his honour involved, let him stipulate for propriety, otherwise there is no molestation (*Fearon v. Earl of Aylesford*, 14 Q. B. D. 792). An attempt was made in *Sweet v. Sweet* ('95, 1 Q. B. 12, 64 L. J. Q. B. 108) to fritter away this decision on the ground that it did not apply where the wife herself, as distinguished from her trustee, was suing on the covenant—a distinction since the Married Women's Property Act, 1882, as flimsy as that between ‘molest’ and ‘annoy.’ Adultery by a wife, even when husband and wife are living together, does not relieve him from the marital obligation to provide her with necessaries. She is not to starve. That would be Pharisaism re-incarnate.

The condition commonly inserted now in conditions of sale, giving the vendor a right to rescind if any requisition is pressed which he is unable or unwilling to answer, is, as Romer J. described it in *Smith v. Wallace* ('95, 1 Ch. 385, 64 L. J. Ch. 240), a ‘formidable weapon’ in the vendor's hands. It has become necessary, owing to the complication of real property titles, which is little short of a scandal to English law, but it derogates very greatly from the rights of the purchaser, and it must be fairly used. A vendor, for instance, must not, as he did in *Smith v. Wallace*, keep the purchaser on the hook and play him while he is angling all the while for another purchaser, a bigger fish. This is not genuine legal sport. Romer J. characterized it as ‘tricky.’ If the vendor means to use the power he must elect promptly. The end was that the vendor lost both his bargains. *Caveat vendor*.

An inalienable pension is a luxury, and it is quite natural that the possessor of it should wish to enjoy it in peace, undisturbed by importunate creditors. The debtor in *In re Painter* ('95, 1 Q. B. 85,

64 L. J. Q. B. 22) was in this position, so to avoid a committal order under the Debtors Act and to defeat the machinations of his creditors, he filed his own petition and got himself adjudicated a bankrupt. The Court had its doubts about the legitimacy of the proceeding, but could not declare it to be against the policy of the Bankruptcy Act. In a sense all bankruptcy is defeating creditors, but the law recognizes that a man is not to go about always weighed down by an incubus of debt. If he were, he could never retrieve his position or do his duty as a citizen. To get free of his creditors is as natural and legitimate a desire as to get out of prison. What with public examinations, suspending of discharges, and criminal prosecutions, the present law has made bankruptcy so much more unpleasant for the debtor that he may safely be trusted not to be too eager to present his own petition.

The law must not let itself be 'entangled in the cobwebs of the schools,' as was said of Cowley's poetry; otherwise it would be interesting to follow up the train of ideas suggested by *In re Alice Alderson* (1 M. B. & C. R. 495) as to a debtor absenting himself from his creditors. An Irishman in the fervour of his denunciation of absentee landlords once exclaimed, 'Why, sor, the land's just swarming with them.' In the same way a debtor may be there and not there, as Miss Alderson was at Tunbridge Wells, present indeed in the flesh, but masquerading under an alias. 'Is a debtor,' asked Vaughan Williams J., 'who goes to a meeting of his creditors disguised, present at the meeting?' Corporeally he is, but so far as creditors who may want to question him are concerned he might just as well be in bed or at the antipodes. So our matter-of-fact law regards it. A debtor 'absents himself' within the meaning of the Bankruptcy Act when he makes it impossible for his creditors to get at him. That is the common sense of the thing.

We find it necessary to remind our contributors and correspondents that it is impossible, except in very special cases, to insert articles at short notice, as we almost always have a considerable quantity of matter standing over. Long articles are much more subject to inevitable delay than short ones.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

In Memoriam.

W. E. HALL.

THE works upon International Law of the late William Edward Hall are read and valued in all English-speaking countries ; wherever, indeed, any attention is given to the study of the subject. But no one from these works alone could form an idea of the man who may almost be said to have written them in the intervals of leisure from more congenial occupations. As one who for nearly forty years enjoyed Mr. Hall's friendship, I am desirous of attempting some description of his many-sided character, and of placing upon record the principal events in the life which has so prematurely closed.

William Edward Hall was the only child of William Hall, M.D., a descendant of a junior branch of the Halls of Dunglass, and of Charlotte, daughter of William Cotton, F.S.A. He was born August 22, 1835, at Leatherhead, in Surrey, but passed much of his childhood abroad ; for Dr. Hall became Court physician to the King of Hanover, and was, I think, subsequently attached as physician to the British Legation at Naples. Hence, perhaps, Hall's taste in after-life for art and for modern languages. A constitution originally not too robust led to his subsequent education being conducted by private tutors, rather than at a public school, but at the unusually early age of seventeen, in December, 1852, he matriculated at University College, Oxford. In 1856 he became B.A., after taking a third class in the final classical school, and a brilliant first class in the then recently instituted School of Law and Modern History. He always attributed this, his first success in life, to the help and guidance which he received from Dr. Tristram, who was then, for a short time, taking pupils at Oxford, before leaving it for Doctors Commons. In 1859 he gained the Chancellor's Prize for an English Essay upon 'The effect produced by the precious metals of America upon the greatness and prosperity of Spain,' having learnt Spanish in order to be able to consult his authorities in the original. He had previously become a member of Lincoln's Inn, and read conveyancing with Mr. Braithwaite and equity with Mr. (afterwards Vice-Chancellor) Wickens. He was called to the bar in November, 1861, but was not, I think, over-assiduous in attendance at his chambers in Stone Buildings. He

was living at the time in the Berkeley Chambers in Bruton Street, whither I soon followed him, and was then throwing most of his energies into the study of Italian art, improving also his conversational knowledge of the Italian language. He had already travelled over a great part of Europe, bringing home admirable sketches, then usually of churches or street architecture, and about this time became an enthusiastic member of the Alpine Club; making several first ascents, notably that of the Lyskamm¹, and of the Dent d'Hérens; taking a leading part in the famous special committee of 1864 on ropes and ice-axes; contributing many articles, some of them illustrated with drawings by his own hand, to the journal of the Club²; and rejoicing in the dinners, then held at a little French restaurant in St. Martin's Lane, of an inner coterie of the climbing fraternity.

In March, 1864, I persuaded Hall to leave the so far unfruitful purlieus of Equity, and to share the chambers which I had just taken in Brick Court. He at the same time joined the Western Circuit, doubtless influenced in the choice of it by the fact that his father was then residing at Heavitree, near Exeter. It must have been almost immediately afterwards that he accompanied Mr. Auberon Herbert on a visit to the seat of war in Denmark, where the friends were several times under fire: once, I think, accompanying a sortie of Danish troops from Sonderborg, armed only with walking-sticks. In September, 1866, Hall married Imogen Emily, daughter of Mr. (afterwards Mr. Justice) Grove, and took a house in Onslow Gardens, still keeping up his habits of travel, as also his keen interest in military matters, which induced him in 1867 to publish a pamphlet entitled 'A Plan for the re-organization of the Army.' After the death of his father, in 1869, he was in easy circumstances, especially as he never had any children. In 1868 he went out on behalf of the Tichborne claimant to South America, and in 1873 made a sporting tour in Lapland. He also did some good work, the results of which are embalmed in Blue-books, for several Government Offices. Thus, in 1871, he acted as an 'Inspector of returns,' under the Elementary Education Act of 1870, for a district in the West of England; and was occasionally engaged in subsequent years, down to 1875, in assisting the permanent staff at Whitehall to set the new system going. In 1876 and 1877 he was commissioned by the Board of Trade to report upon the oyster fisheries at Arcachon and other places in France, as also upon some of the English oyster-beds.

Towards the end of the seventies, Hall settled at Llanfihangel,

¹ Peaks, Passes, and Glaciers, second series, ii. pp. 383-396.

² e.g. *Alpine Journal*, i. pp. 92, 141, 209; iii. p. 200; iv. p. 327; v. p. 23; vii. p. 169.

a fine old Elizabethan mansion, with a good deal of land about it, in Monmouthshire. Here he became a Justice of the Peace, entertained shooting parties, and indulged his taste for scientific gardening; for his knowledge of botany was considerable, and he had a passion for flowers. Here also he was able to arrange to advantage the collections of antiquities and works of art, to which his frequent tours enabled him to make constant additions. In 1884 he took some steps towards securing a seat in Parliament at the next election, and was adopted as Conservative candidate for Hereford. But the expedition for the rescue of Gordon was being organized, and Hall would not neglect the opportunity, which, as he thought, was open to him, of entering Khartoum with the British forces. Travelling on a camel, often without any escort, he reached the head-quarters at Dongola; but things were then so critical at the front that Lord Wolseley ordered him back to Cairo. Nothing daunted, he sailed round to Suakin, and, though just too late for the encounter at McNiell's zariba, he rode over the battlefield two or three days afterwards, under a dropping fire from the enemy. The negotiations carried on after his return with several Parliamentary constituencies led to no result; and in May, 1886, came the death of his wife, which was a terrible blow to him, and was followed by a prolonged absence from England, during which he visited India, giving much study to the question of the defence of its North-Western frontier, Burmah, and Japan. In 1888 he paid a flying visit to Bulgaria, when he characteristically made a careful map of the field of Slivnitza; hurrying straight back to a shooting which he had taken in Norway. Still restless, he spent the autumn of 1889 and spring of 1890 in Greece and Egypt. In April, 1891, he married Alice Constance, daughter of Colonel Hill, of Court of Hill, Shropshire, and settled down for a few more years of happiness at Coker Court, an interesting old mansion, with gardens and park, in Somersetshire; and here it was that, on November 30, 1894, in the fullest enjoyment, as it seemed, of mental and bodily vigour, he was suddenly struck down.

So passed away one of the most accomplished men of his generation, whose very versatility prevented him from achieving a larger measure of what is called success, just as his capacity for doing good service for his country was beginning to be recognized. He was a good friend, and perhaps also a good hater. He was an extraordinarily rapid worker, a keen sportsman, absolutely fearless, sensitive and proud, modest and ambitious, a delightful companion. In Law, as a profession, he took no great interest, nor had he the patience to await its tardy favours. His ideal was the English country gentleman, with cosmopolitan experiences, encyclopaedic

knowledge, and artistic feeling. His own rare excellence as an artist is attested by hundreds of water-colour sketches, taken in every quarter of the globe, and his knowledge of the archaeology of art by the extensive collections which he had made of typical objects of all kinds, from Greek vases to Japanese carvings. His real vocation in life was, I believe, to have become a great general.

Hall had at one time amassed materials and had formed plans for ambitious works upon such topics as the history of civilization and the history of the British Colonies, but was at length led, almost by accident, to concentrate his literary activity upon that department of thought in which he was destined to become an acknowledged master. In 1874 he published a thin octavo upon 'The Rights and Duties of Neutrals,' which he followed up in 1875 by an article in the *Contemporary Review* upon 'Certain proposed changes in International Law.' His *magnum opus*, 'International Law,' which first appeared in 1880, and of which a fourth edition is now in the press, marks an epoch in the literature of the subject. No work so well-proportioned, so tersely expressed, so replete with common-sense, so complete, had ever appeared in this country. It at once became an authority even amongst Continental jurists, to whom, as a rule, his adherence to what they call *l'école historico-pratique* is distasteful. It was only last year that we welcomed in these pages the publication of his valuable monograph upon 'The Foreign Powers and Jurisdiction of the British Crown'.¹

The position occupied by Hall among International lawyers was beginning, as already hinted, to obtain recognition from the powers that be. He was selected by Lord Salisbury and Lord Knutsford to be one of the British arbitrators whenever the arbitration should take place between this country and France with reference to the lobster fisheries in Newfoundland; and the appointment was fully approved by Lord Rosebery, Lord Kimberley and Lord Ripon, after the change of Government. In anticipation of the arbitration, Hall rendered services, in the preparation of materials and arguments, which were highly appreciated by the Foreign and by the Colonial Office.

Hall had on several occasions delivered a course of lectures on International Law at the Royal Naval College at Greenwich; and a course of such lectures was in fact interrupted by his death. His proficiency in his subject had been long ago recognized by his election in 1875 as *Associé*, and in 1882 as *Membre*, of the 'Institut de Droit International'; at the meetings of which learned body his

¹ LAW QUARTERLY REVIEW, x. p. 276.

opinions were received with the respect which they deserved. It is with regretful recollections of happy days of debate and festivity, passed with him at the Hague, at Paris, at Oxford, at Turin and at Heidelberg, on the occasion of such meetings, that I close this article.

T. E. HOLLAND.

NOTES ON INSURANCE LAW.

On Express Warranties.

IT is laid down at page 632 of the second edition of Arnould on Insurance, that non-compliance with an express warranty contained in a marine policy will be excused if a subsequent law should be passed rendering compliance with the warranty illegal. A similar statement is to be found in the later editions of Arnould and in Phillips on Insurance; and in accordance with the statements of these writers it is provided in the thirty-fourth clause of the Bill which has been brought in to codify the law of Marine Insurance that 'non-compliance with a warranty is excused, when compliance with the warranty is rendered unlawful by subsequent legislation.'

It seems to me, however, that this is not the law and ought not to be the law.

Arnould makes the following statement: 'It is an old principle of law, that if a man covenants to do a thing which is lawful at the time, but an act of Parliament comes in and hinders him from doing it, the covenant is repealed: the same rule extends to warranties, and it may be stated generally, that compliance with a warranty will be dispensed with, if it be rendered unlawful by a law enacted since the time of making the policy.'

Phillips in section 769 says: 'A compliance with a warranty or any other agreement is dispensed with, if it be rendered unlawful by a law enacted after the time of the making of the policy.' Both authors cite in support of these views the case of *Brewster v. Kitchell*, 1 Lord Raymond, 321. This case, however, by no means decides the point; it merely shows that the performance of a stipulation or promise is dispensed with if it is rendered unlawful by subsequent legislation, and it has no application to a condition. Indeed it is clear on principle and authority that where a contract is made subject to a condition, and compliance with a condition is rendered unlawful by subsequent legislation, the result is to make the contract itself voidable (see Comyns' Digest, Condition D (3), *Davis v. Cary*, 15 Q. B. 418, *Brown v. Mayor of London*, 30 L. J., C. P. 230, and Pollock on Contracts, sixth edition, pages 415 to 419, where the questions relating to impossible contracts are very carefully

investigated). Now a warranty in a marine policy is a *condition* rendering the contract voidable in case of non-compliance and not a stipulation for breach of which an action lies. It is this essential distinction between a condition and a stipulation that Mr. Arnould and Mr. Phillips have overlooked.

Suppose that an insurance is effected on a ship with a warranty that she is to sail from London to Quebec on or before the 1st of August, and that legislation subsequent to the policy made it unlawful for the ship to sail on such a voyage before the 1st of September, it surely could not be held that the underwriters were liable on the policy if the vessel sailed on the 1st of September, for to hold this would be to make them liable on a contract materially different from that entered into by them.

It is, on the other hand, important to note that non-compliance with a warranty in a marine policy will not be excused on the ground of compliance being rendered impossible by perils insured against. This important point is established by *Hore v. Whitmore*, Cowper, 784, and is referred to in Arnould, second edition, p. 784. It is true that the contrary is asserted by Phillips in section 770, where he says, that 'when the fact warranted is falsified by the direct effect of a peril insured against, it is not a breach of the warranty.' But in support of this view he cites the case of *Havelock v. Hancill*, 3 T.R., 277, 1 R.R. 703. This case, however, when carefully examined will be found to decide nothing more than this—that where there is a warranty that the trade on which the ship is or shall be employed is lawful, it only means that the trade on which the ship is or shall be employed *by her owners* is lawful, and that therefore the underwriters are liable for a loss occurring whilst the ship is engaged in an unlawful trade, if the master was so employing her *barratrously* and without the consent of the owners.

On Bottomry.

At page 299 of Arnould on Marine Insurance there is the following statement relating to bottomry: 'The borrower on bottomry and respondentia has no insurable interest in the property pledged, except in as far as the value of such property exceeds the amount for which it is pledged. If pledged to its full value, it is obvious that the borrower can have no insurable interest in its safety, for in such case, if the property arrives, it goes to satisfy the debt; if lost by the risks within the hypothecation, the borrower is discharged.'

This statement is, it is submitted, for the following reasons erroneous. If the bottomry bond is in the ordinary form, the

money lent on bottomry is due in every case except that of an absolute total loss (*Stephens v. Broomfield*, L. R. 2 P. C. 516; *Broomfield v. Southern Insurance Company*, L. R. 5 Ex. 192). It follows that in the case of any damage or loss not amounting to an absolute total loss, the borrower continues liable for the debt, and at the same time incurs a loss to the extent of the damage his property has sustained. It follows therefore clearly that he has an insurable interest for the same reason as a mortgagor has an insurable interest, but that he cannot in the case of an absolute total loss recover more than the excess, if any, of the value of his property over the amount of what is due under the bottomry bond.

On the other hand, the lender on bottomry has an insurable interest in respect of the loan, inasmuch as he loses the debt in the case of an absolute total loss of the property. He therefore can recover against the underwriter in case of an absolute total loss, but he can do so in no other case of loss, unless the bottomry bond provides, as certain foreign bottomry bonds do, that the debt shall be diminished in proportion to the damage which the property may sustain by the perils of the seas. (*Broomfield v. Southern Ins. Company*, *supra*.) It follows from all these considerations that the question whether the borrower or lender on bottomry has an insurable interest is easily solved by applying the ordinary principles which govern insurable interest in general, and taking into consideration the nature and effect of the particular instrument of hypothecation, and that no rules other than the ordinary rules of insurance law are required for its solution.

ARTHUR COHEN.

THE LAW OF NATURE.

HE who, being first trained in the manner of English legal thinking, comes thereafter to the study of the juridical theories prevalent upon the Continent, finds himself a stranger in a strange land. Therein he wanders disconsolate, hearing unknown doctrine taught in an unknown tongue. Of this discordance between English and Continental thought the causes are various, but no small share is to be attributed to the influence of a curious difference between English and Continental legal nomenclature. Of the power of words over thought there is indeed no more notable or profitable example. It has often been remarked that in most languages, ancient and modern, the same term is used to signify both law and right. *Jus, Droit, Recht, Diritto*, all have this double signification. To this rule modern English is a striking exception. We have no term that combines the ethical and juridical meanings; *right* is purely ethical, *law* is purely juridical. This indeed was not always so, for the Anglo-Saxon *riht* has the double meaning still possessed by its Continental relatives, and, in the old books, we find *common right* used as the equivalent of *common law*. How it came to pass that our language rejected this ancient and universal usage we know not. Bentham would probably have suggested, had the matter been called to his attention, that, to the practical good sense of Englishmen, the profound difference between law and justice was too obvious to admit of their being called by the same name. Be this, however, as it may, there can be no doubt of the immense influence exerted by this difference of nomenclature in differentiating English from Continental juridical and even ethical thought. This peculiarity of our speech has been in part beneficial, in part detrimental, to our thinking. It is commonly an advantage to call different things by different names, and the more closely two ideas are related, the more necessary is it, for clear thinking, that they should be verbally distinguished. On the other hand, when two related things are called by the same name, this identity is an ever present indication and reminder of the relation between the things signified. Hence it is, that English thought has so clearly distinguished between law and right, jurisprudence and ethics, as in great measure

to have overlooked the connexion between them, and to have eliminated the ethical element from the idea of law. Continental theory, on the other hand, shows a tendency—to English eyes, at least—to fall into exactly the opposite fault, and to see so clearly the intimate connexion between the two ideas, as to fail to draw between them a sufficient distinction.

To this difference of language, and to the consequent difference in the tone of juridical speculation, we may attribute, more than to any other single cause, the acceptance on the Continent and the rejection in England of that which the French call *droit naturel*, and the Germans *Naturrecht*. It follows, from what has been already said, that our language can supply no equivalent for these terms, for they combine ethical and juridical significations in a manner not permitted to English speech. To express the ethical meaning we must use the terms *natural right* or *natural justice*; while the juridical meaning is expressed by the terms *natural law* or the *law of nature*. For a full equivalent for the French and German expressions, we may resort to the corresponding Latin *jus naturale*, which possesses the same twofold meaning, being either *justitia naturalis* or *lex naturae*.

It has been much the fashion on this side of the Channel, in jurisprudence as well as in some other matters, to go our own way without much knowledge or care of what is being done elsewhere. We have said in our hearts: 'Shall we, who have given laws to half the earth, go to learn legal science from our neighbours? Or shall we, who have learned from Bentham and his like to follow in such matters the guidance of clear-eyed common sense, go to fill our bellies with the east wind of German metaphysics?' I shall not here stay to consider whether this insular independence is justified by its works. It is perhaps a tenable opinion that we have little to learn from Continental jurisprudence, but, whether this is so or not, it is the part of wisdom to hear the other side and to know our enemies. Now, for the understanding of the legal thinking of our neighbours, it is essential that we should comprehend the pervading and fundamental doctrine of *jus naturale*. This is not of yesterday; it is an inheritance (peradventure *damnosa*) descended from old time; and an adequate comprehension of it is best attained by the study of its history, much doctrine being best known and judged by its ancestry and descent. To an outline of that history the following pages will be devoted.

In legal science, as in so many other departments of thought, rational speculation begins with the Greeks. In the practical work of law-making they were far excelled by the Romans, but it is to Athens and not to Rome that we owe those doctrines which formed

the speculative basis of ancient jurisprudence, and which continue to this day to influence juridical thought. Chief among those doctrines is that of *jus naturale*. When men came to consider the notions of right and justice that prevailed at different times and places, they found them, not uniform, but infinitely various. What one nation regarded with approval, another condemned. The Greeks buried, but certain barbarians ate, the dead bodies of their fathers, and each people thought the conduct of the other, in this respect, abominable. Hence arose the question whether this whole matter of right and wrong, justice and injustice, was a mere affair of custom and convention; or whether, underlying all these variations of opinion and sentiment, there was a permanent, uniform, and theoretically valid distinction between that which is in itself right and just, and that which is in itself wrong and unjust—a distinction to the imperfect and partially mistaken recognition of which the various moral sentiments of men were due. Another line of thought led up to the same question. That which is just is very often different from that which is expedient for the doer of it. Justice is not seldom the good of others rather than that of the just man himself. Is not justice, therefore, suspiciously like folly, and has it any basis in reason and the nature of things? Is it not rather the product of mere human convention, established by the weak and simple for their own benefit, and as a protection against the strong and cunning? Is it not, therefore, the part of the strong and cunning to disregard any such arbitrary conventions, and to go their own way to their own end, the realization of their own highest good? If there is any such thing as justice in itself, apart from human convention, is it anything save the right of the strongest to use all the means given him by his strength for his own preservation and advancement?

The answer made to these questions by Greek philosophy is that there are two distinct species of right—the right absolutely or in itself, and the right as recognized and established among men. This distinction was expressed by the use of the contrasted terms *φύσις* and *νόμος*, nature and convention—terms which were of general application to indicate this same contrast between anything which exists of itself or in the nature of things, and anything which is the product of human art, contrivance, custom, institution, or convention. Thus it was a question with some whether the gods existed *φύσει* or merely *νόμῳ*. *Νόμος*, of course, is here used in an earlier and wider sense than that later and specialized application in which it signifies one particular species of human institution, namely statute law.

Such then was the nature and origin of the distinction between

natural right (*φυσικὸν δίκαιον*) and conventional or positive right (*νομικὸν δίκαιον*). From the conception of natural *right* to that of natural *law*, the transition was easy. The connexion between right and law—the aspect of law as the declaration and enforcement of the principles of right—was never overlooked by the Greek mind. Thus Plato speaks of the legislator as giving ‘laws, written and unwritten, determining what was good or bad, honourable or dishonourable, just or unjust, to the tribes of men¹.’ If, then, positive right was declared and enforced by positive law, was there not a natural law (*φυσικὸς νόμος*) which declared and enforced the principles of natural right? The unanimous reply of Greek philosophy was that such a law did in truth exist, and from that day to this such reply has continued to exercise a profound influence on the course of ethical and juridical thought. This transition from the conception of *φυσικὸν δίκαιον* to that of *φυσικὸς νόμος* was, in all probability, facilitated by the juridical implications of the terms *δίκη* and *δίκαιον*. When the same word means both right and law, it cannot be difficult to pass from the idea of natural right to that of natural law.

In the original use of the phrase natural right, the term *natural* means merely, as we have seen, the opposite of conventional; natural right is adequately explained as being that which is right in itself apart from human institution. But when we pass from this conception to that of natural law, we find that no such purely negative interpretation is in this case adequate. For law necessarily involves a legislator, and, therefore, if we assert the existence of natural law, we must be prepared to point out its source in some legislative authority. The reply of the Greeks was that the source of natural law was nature, and this reply involves a transition to a positive conception of nature as the personified universe and as giving laws to men. Natural law becomes the law of nature. This idea of nature as legislative obtained full development and definiteness only in the materialistic pantheism of the Stoics, but it was not peculiar to that school. That a life according to nature was the true end and duty of man was a doctrine which obtained a more or less prominent place in most of the Greek systems of ethics. In the mouths of some this principle received the merely negative interpretation already mentioned. To live according to nature was to despise the artificiality and conventionality of civilized life. In other philosophies, however, nature is conceived as the personified universe, and to follow nature is to obey those rules which are laid down by nature for the governance of rational

¹ *Statesman*, 295.

beings. In Stoicism, as I have said, this idea came to its full growth. Nature or the Universe was conceived by the philosophers of the Porch as a living organism, of which the material world was the body, and of which the Deity or the Universal Reason (Logos) was the pervading, animating, and governing soul. It was the duty and end of man as a part of this world-organism to live in harmony therewith, and to obey the precepts of that Reason by which all things are governed and directed. These precepts are the law of nature.

From the Greeks, and from later writers, natural law has received various other designations expressive of its different aspects. It was often called, as for instance by Aristotle, the Unwritten Law, as being inscribed neither on pillars of stone nor on brazen tablets, but solely in the hearts of men. This contrast between written and unwritten law is, however, of ambiguous import, being also used to express a distinction within the sphere of civil law itself. Under another aspect, natural law was called the Universal or Common Law (*κοινὸς νόμος*), as opposed to Particular or Special Law (*ἰδίος νόμος*). The law of the state was in force only within the boundaries of the state, nor did any two states use the same laws; but the law of nature was of universal force and validity. It is this aspect of natural law which was afterwards expressed by the Roman term *jus gentium*, the law of the nations or of the world. The law of nature, moreover, was conceived as valid, not only in all places, but also at all times, being without beginning or end; while positive law, on the other hand, was temporary and mutable. Hence, as we shall see, the Eternal Law (*lex aeterna*) of St. Augustine and the Schoolmen. Yet another term that came in later times to be used as the equivalent of the law of nature was the Law of Reason. It was from nature, conceived as rational—as animated by the Universal Reason of the world—that the law natural was deemed to proceed. Moreover, it is through the possession of reason that man is enabled to know the precepts of the law and to conform his conduct thereto. These precepts are addressed to, and perceived by, man's rational nature, and hence they constitute the law of reason. Finally, the theological aspect of this law, under which it was conceived as the divine law, was at all times more or less definitely recognized. Prior to the development of the pantheism of the Stoics, such recognition was little more than an echo of popular religious opinion. Stoicism, however, by its identification of God and nature, was led necessarily to identify the law of nature with the law of God. And when, on the rise of Christianity, the philosophical ideas of the Greeks became combined with the religious and theocratic ideas of the Hebrews,

this theological aspect of the law of nature came still more prominently into the foreground of thought.

We must not overlook the confusion and indeterminateness introduced into much of ancient thought by the twofold meaning of the terms nature and reason. Nature is either the universal nature or human nature. Reason is either that of the soul which animates and rules the world, or that of man himself. Primarily and principally, as we have already seen, the law of nature or of reason is referred to the universal nature or the universal reason, but a tendency to the anthropological interpretation of the doctrine is distinctly traceable, and the two conceptions are often found more or less confusedly combined¹. In later times, when the pantheistic idea of universal nature as legislative had disappeared, the doctrine that the law of nature was that which had its source in human nature, played, as we shall see, a great part in the history of ethical speculation, being indeed the great rival of the theological doctrine that such law proceeds from the divine will.

After this general statement of the origin and nature of the conception variously expressed by the terms law of nature, law of reason, divine law, universal law, eternal law, and unwritten law, we may refer to a few passages in which Greek writers have given expression to this idea. In the writings of Plato we find clear recognition of the existence of natural right. The *Gorgias*, for instance, contains a vigorous exposition, by one Callicles, of the stock sophistical and sceptical argument against the reality of any natural right, other than that right which is coincident with might, the right of the strongest to use his strength in his own interest; and to a refutation of this argument no small part of Plato's ethical writings is devoted. One of the chief objects of the *Republic* is to demonstrate the reality of a natural justice, of which conventional justice is but an imperfect image or shadow, and to prove that to follow after this reality is not foolishness but the part of a wise man. 'Justice in her own nature,' he concludes, 'has been shown to be best for the soul in her own nature. Let a man do what is just, whether he have the ring of Gyges or not, and even if, in addition to the ring of Gyges, he put on the helmet of Hades².' The idea, however, of a natural law, declaring and enforcing this natural right, as positive law declares and enforces positive right, is not prominent in the thought of Plato. Where it does appear, it is rather in its theological than in its philosophical form. Yet in the passage of the *Gorgias* already referred to, the

¹ We see, for instance, the two ideas combined in Cicero: '*Sic enim est faciendum ut contra universam naturam nihil contendamus, ea tamen conservata propriam naturam sequamur.*' *De Officiis*, i. 31. 110.

² *Republic*, 612.

Sophist expressly applies the distinction between νόμος and φύσις to law as well as to justice. Xerxes invaded Hellas, and his father the Scythians, not according to that artificial law which we invent and impose upon our fellows, but none the less in accordance with the law of nature¹.

In the writings of Aristotle, on the other hand, we find express and repeated recognition, not only of the two species of right, but also of the two corresponding forms of law. The following passage from the Nicomachean Ethics contains a clear statement of the first of these distinctions: 'Of political justice², one part is natural and the other conventional. Natural justice is that which has the same force everywhere, and does not depend upon being received. Conventional justice is that which originally was a matter of indifference, but which, when men have instituted it, is indifferent no longer. . . . Now some think that all justice is conventional, because, while the natural is immutable and has everywhere the same force (as fire burns here and in Persia), they see the rules of justice altered. But this is not so³.' The following extracts from Aristotle's Rhetoric exhibit, on the other hand, the transition from the conception of natural right to that of natural law: 'Let injustice be defined as the voluntary commission of hurt in contravention of law. Now law is either universal or particular. The particular law I call that by whose written enactments men are governed. The universal law consists of those unwritten rules which appear to be recognized among all men⁴.' And again: 'Right and wrong have been defined in reference to two kinds of law. . . . Particular law (ἰδίος νόμος) is that which has been established by each people in reference to itself. . . . The universal law (κοινὸς νόμος) is that which is conformable merely to nature⁵.' And again: 'Equity remains for ever and varies not at any time; neither does the universal law, for this is in conformity to nature; but the written law varies often⁶.' In these passages we see natural law recognized in most of its various aspects, the theological, however, being conspicuous by its absence. This law is (1) unwritten (*jus non scriptum*), (2) universal (*jus gentium*), (3) eternal and immutable (*lex aeterna*), and (4) according to nature (*lex naturae*).

We have already seen that it was in the teaching of Stoicism

¹ Gorgias, 483.

² The term political justice (πολιτικὸν δίκαιον) must not be confounded with conventional or positive justice (νομικὸν δίκαιον). The former is that which exists between the free and equal citizens of a state, and is opposed to the quasi-justice (economic justice) which regulates the relations of the members of a family. The distinction is of no theoretical importance, although of considerable historical interest.

³ Nic. Eth. v. 7.

⁴ Rhetoric, i. 13.

⁵ Rhetoric, i. 10.

⁶ Ibid. i. 15.

that full development was attained by the doctrines, that a life according to nature was the end of man, and that to the dictates of an eternal and unchanging law of nature all human action should be conformed. The opinions of the earlier and Grecian Stoics are for the most part known to us only at second hand, and we shall shortly have occasion to consider the Stoical theory in that later form in which it is presented to us by Cicero and other Roman writers. In the meantime, however, we may cite a celebrated fragment of early Stoical literature. In the Hymn of Cleanthes, the successor of Zeno, the founder of Stoicism, we have a remarkable expression of the conception of natural law in its aspect as the eternal and universal law of God governing and directing all things. 'O King most high, nothing is done without thee, neither in heaven, nor on earth, nor in the sea, except what the wicked do in their foolishness. . . . But the wicked fly from thy law, unhappy ones, and though they desire to possess what is good, yet they see not, neither do they hear, the universal law of God. . . . There is no greater thing than this, either for mortal men or for the gods, to sing rightly the universal law ¹.'

Such then was the doctrine of natural law as it originated in the intellect of Greece. We have now to examine briefly the chief episodes in the subsequent life-history of this celebrated and influential conception. From Athens to Rome it went with the rest of Greek philosophy, and in the writings of Cicero it finds eloquent expression. Cicero was a pupil of Posidonius, the leading Stoic of his day. Stoicism had by this time, however, assumed a liberal and eclectic character, which doubtless helped to commend it to the practical Roman mind, and the writings of Cicero are characterized rather by a reasonable eclecticism than by a rigid adherence to the doctrines of any particular school. From his works we may gather a very tolerable notion of the juridical and ethical theories of Greece as echoed in the language of Rome. The φυσικὸν δίκαιον of the Greeks appears as *justitia naturalis* or *jus naturale* (in its ethical sense). The φυσικὸς νόμος, which declares and renders obligatory the φυσικὸν δίκαιον, appears as *lex naturae* or *lex naturalis* or *jus naturale* (in its juridical sense).

'Of all these things respecting which learned men dispute, there is none more important than clearly to understand that we are born for justice, and that right is founded not in opinion but in nature².' 'There is indeed a true law (*lex*), right reason, agreeing with nature, diffused among all, unchanging, everlasting, which calls to duty by commanding, deters from wrong by forbidding. . . . It is not allowable to alter this law, nor to derogate from it, nor

¹ See Grant's *Ethics of Aristotle*, i. 266.

² *De Legibus*, i. 10. 28.

can it be abrogated. Nor can we be released from this law either by the senate or by the people, nor is any person required to explain or interpret it. Nor is it one law at Rome and another at Athens; one law to-day and another hereafter; but the same law, everlasting and unchangeable, will bind all nations at all times; and there will be one common lord and ruler of all, even God the framer and proposer of this law¹. 'Law is the highest reason, inherent in nature, which commands those things which ought to be done and forbids the contrary².' 'There is a reason issuing from nature, impelling towards right and dissuading from wrong, which did not then first begin to be law when its dictates were expressed in writing, but when it first arose, and it arose at the same time as the divine mind. Wherefore the true and highest law, well fitted to command and forbid, is the right reason of the supreme divinity (*recta ratio summi Jovis*)³.'

When from the speculations of Cicero we turn to the more practical work of those great lawyers whose labours, during the first three centuries of the Christian era, constructed the imposing fabric of the Roman law, we find that the law of these men is much better than their philosophy, and that such fragments of abstract doctrine as may be extracted from their writings are little more than re-statements, not always very intelligent, of the theories already examined by us. The Romans accepted the conception of natural law as they received it from the Greeks, and used it as an instrument of legal development and reform. The law natural is to the law civil as the ideal is to the real, and the spirit of reform saw therein the pattern to which the laws of the state should be more and more conformed. The only matter worth special notice in this connexion is the use by the Roman lawyers of the term *jus gentium* as the equivalent of *jus naturale*. 'Every people,' says Gaius, at the commencement of his Commentaries, 'governed by law and custom, uses law which is in part peculiar to itself and in part common to all mankind. That law which any people establishes for itself is peculiar to itself, and is called the civil law (*jus civile*), as being the particular law of the state (*jus proprium civitatis*). But that law which natural reason has established for all men, is observed by all peoples alike, and is called the law of nations (*jus gentium*), as being that which all nations use.' By Cicero and other writers, and by Gaius himself in other places, this *jus gentium* is expressly identified with *jus naturale*. At first sight this contrast between *jus gentium* and *jus proprium civitatis* is identical with Aristotle's distinction, already referred to, between κοινὸς νόμος and ἰδίος νόμος. It is commonly accepted doctrine, however, that the *jus gentium* was a purely Roman idea, attained by Roman

¹ De Republica, iii. 22. 33.² De Legibus, i. 6. 18.³ Ibid. ii. 4. 10.

lawyers long before any knowledge of a *jus naturale* had come to them from Greek philosophy, and that it was only after the introduction of such philosophy that the Romans came to identify their own *jus gentium* with the *κοινὸς νόμος* of the Greeks. What amount of truth, if any, there is in this theory we cannot now stay to consider.

At the commencement of the Christian era we find the Greek theory of natural law coming into contact with the theology of the Hebrews. In the ethical doctrines, both of Christian and Jew, the conception obtains a prominent place. The inevitable result of this alliance with Hebrew monotheism is that the theological aspect of the law of nature becomes entirely predominant. Nature is identified with God, and the law of nature with a particular part of the law of God—that part, namely, which is known to men independently of any express revelation or institution, as opposed to that part which is known only as written in the Scriptures of the Old and New Testaments, and which came subsequently to be distinguished as the *positive* divine law. In the writings of Philo Judaeus we find constant reference to natural law and justice. ‘The unerring law is right reason; not an ordinance made by this or that mortal, a corruptible and perishable law, a lifeless law written on lifeless parchment or engraven on lifeless columns; but one imperishable and impressed by immortal nature on the immortal understanding¹.’ He speaks likewise of that ‘right reason which is the fountain from which all other laws do spring².’ And again of the virtuous man as ‘taking God alone for his guide and living in strict accordance with the law, that is to say, with the right reason of nature³.’ So also in the writings of the fathers of the Christian church. St. Augustine distinguishes between the temporal law which is made by men and governs human states, and the *lex aeterna* which proceeds from the divine mind and rules the City of God. In the Divine Institutes of Lactantius we have an interesting criticism of ancient philosophy from the early Christian point of view, and an attempt is made to show the insufficiency of the pre-Christian forms of natural law and natural justice.

‘Plato and Aristotle desired with an honest will to defend justice, and would have effected something if their good endeavours, their eloquence, and vigour of intellect, had been aided also by a knowledge of divine things. Thus their work, being vain and useless, was neglected; nor were they able to persuade any to live according to their precepts, because that system had no foundation from heaven. . . . For when they discuss the subject of virtue,

¹ Works of Philo Judaeus, iii. 516 (Bohn's Ecclesiastical Library).

² Ibid. iii. 517.

³ Ibid. iii. 520.

although they understand that it is very full of labours and miseries, nevertheless they say that it is to be sought for its own sake; for they do not see its rewards, which are eternal and immortal. Thus by referring all things to this present life they altogether reduce virtue to folly, since it undergoes such great labours of this life in vain and to no purpose¹.

Natural justice is not folly, only because it is commanded by natural law, and this law has, as its legislator, God, and as its sanction, exceeding great rewards and punishments in another world. 'God Himself,' says Lactantius, 'is Nature².'

Henceforward, for many a barren century, there is nothing of any interest or importance in the way of juridical speculation, and it is not until the rise of the Scholastic philosophy that we find any manner of thinking that calls for our attention. Scholasticism was an attempt to construct a system of philosophy combining and harmonizing the doctrines of orthodox Christianity with those of ancient and pre-Christian thought. Such a system was primarily theological, but in its full development it included both ethics and jurisprudence—ethics as being intimately connected with religion, and jurisprudence or the theory of law (taken in its widest sense), as being bound up with the theory of ethics and with the doctrine of the divine governance of the world. Scholastic philosophy attained its completest development and most enduring expression in the writings of St. Thomas Aquinas, in the thirteenth century. The *Summa Theologiae* of this greatest of the Schoolmen contains a treatise *De Legibus* and another *De Justitia*, which together formulate a system of jurisprudence which has exercised immense influence on the subsequent course of thought, and which, within the domain of Roman Catholic philosophy, is to be seen alive and influential to this day.

The system of Aquinas is a skilful combination of the scattered elements of juridical doctrine to be found in the various authorities which constituted the recognized basis of Scholastic teaching. These elements stood, naturally enough, in grievous need of reconciliation, and this was effected by the dexterous application of that method of subtle distinction, to which the fame of the Schoolmen and the bewildering bulk and complexity of their philosophy are so largely due. Of these authorities the chief is Aristotle, who, as 'the Philosopher,' dominated Scholastic thought in all its later developments. St. Thomas's theory of justice, for example, is little more than a skilful and laborious attempt to present as a coherent and intelligible doctrine the confused and confusing reasoning contained in the fifth book of the *Nicomachean Ethics*. His theory

¹ *Divine Institutes*, Bk. v. ch. 18.

² *Ibid.* Bk. ii. ch. 9.

of law, on the other hand, is much less intimately and directly connected with Aristotelian doctrine. The immediate authorities in this case are rather the Roman jurists and the fathers of the Church. From the scattered fragments of juridical doctrine to be found in these writings, the subtle and powerful intellect of the *Doctor Angelicus* has built up an imposing system that has served as the foundation of modern jurisprudence.

The most important addition made by Aquinas and the Schoolmen to the old theory of natural law, is the division of that law into two species, distinguished as the *lex aeterna* and the *lex naturalis*. This is an attempt to resolve the ambiguity which we have already noticed as inherent in the ancient doctrine. Nature means either universal nature or human nature; reason is either human or divine. No such ambiguity was tolerable to the spirit of Scholastic philosophy, and hence the distinction, unknown to the ancients, between the law eternal and the law natural. The former has its source in the divine reason; the latter in human reason. The former is the law of universal nature, that is to say, of God; the latter is the law of human nature. Differing thus in their source, these two differ likewise in their scope. Inasmuch as God is the ruler of the whole universe, that eternal law which is the dictate of the divine reason includes within its jurisdiction all the activities of the world, animate and inanimate, rational and irrational. But natural law, proceeding merely from the rational nature of man, governs nothing save the actions of man himself.

‘There is a certain Eternal Law, to wit, Reason, existing in the mind of God and governing the whole universe. . . . For law is nothing else than the dictate of the practical reason (*dictamen practicae rationis*) in the ruler who governs a perfect community. Now it is manifest that if, as we have already seen, the world is ruled by divine providence, the whole universe is a community governed by the divine reason. And so this reason, thus ruling all things, and existing in God the governor of the universe, has the nature of law¹.’ ‘Just as the reason of the divine wisdom, inasmuch as by it all things were created, has the nature of a type or idea; so also, inasmuch as by such reason all things are directed to their proper ends, it may be said to have the nature of an eternal law. . . . And accordingly the Eternal Law is nothing else than the reason of the divine wisdom regarded as directive of all actions and motions².’

With respect to the operation of the *lex aeterna* a distinction must be drawn between the actions of rational beings and all other actions or processes. In the case of the latter, this law gives rise to *necessity*; in the case of the former, it produces merely *obligation*.

¹ Summa, I. 2, q. 91, art. 1.

² Ibid. I. 2, q. 93, art. 1.

To men the eternal law says: You ought; but to the rest of nature: You must. Man alone, by virtue of his prerogative of freedom, is able to break the precepts of this law, but from all other created beings it receives perfect obedience.

Lex naturalis, on the other hand, proceeds from the human reason and governs the actions of man only. Nevertheless, although its immediate source is the reason of man, its ultimate source is that of God. The former is merely the instrument by which man is enabled to know and participate in the dictates of the divine reason. Aquinas does not conceive the human reason as legislative or autonomous. This idea, formulated many centuries afterwards by Kant, was not admitted by Scholastic philosophy. 'Nullus proprie loquendo suis actibus legem imponit¹.' Natural law is not the command of the human reason, but that of the divine reason, revealed to man by his own reason as applicable to human actions and as a source of human obligation. Hence natural law is not something different from the eternal law, but is merely a particular part of it looked at from a particular point of view. It is the eternal law, not as it exists in the mind of its author, God, but as it exists in the minds of the rational beings that are subject to it. It is *participatio legis aeternae in rationali creatura*. Although all created things participate in the eternal law, yet, except in the case of man, such participation is irrational and is not a source of law. It is only in the case of man, therefore, that it is necessary to draw any such distinction as that between the *lex aeterna* and the *lex naturalis*.

'There is in men a certain natural law, namely a participation in the eternal law, whereby men distinguish between good and evil. . . . Since all things which are under divine providence are regulated by the law eternal, as we have already seen, it is plain that all things participate in some sort in this law: in so far, namely, as through its influence they have an inclination towards their proper activities and ends. Among other things, however, rational creatures are in a more excellent manner under the divine providence. . . . Wherefore they participate in the eternal reason, by which they have a natural inclination to their proper acts and ends; and such participation in the law eternal by a rational creature is called the law natural².'

The law of nature commands men to do that which is right, and to avoid that which is evil. It is not, however, the source of the distinction between right and wrong, good and evil. This distinction is founded in the nature of things, and would exist, though not recognized by any law, human or divine. Actions are forbidden by the law of nature because they are wrong, not wrong

¹ Summa, 1. 2, q. 93, art. 5.

² Ibid. 1. 2, q. 91, art. 2.

because they are forbidden. This law is the source, not of the distinction between good and evil, but of that between obligation and liberty. It is by virtue of its commands, that the observance of the good and the avoidance of the bad is advanced to bounden duty. This law is eternal and immutable, the same at all times and places, written with the finger of God in the hearts of men; and although the record may be in part obliterated or corrupted by the evil and weakness of human nature, it can never be wholly erased. All human law must conform to this, and derives all its validity from such conformity. 'All law established by men has the true nature of law so far only as it is derived from the law of nature. But if on any point it conflicts with the law of nature, it is not law but rather the corruption of law¹.'

We have seen that the eternal law is divisible into two parts, one of which governs the voluntary actions of men and is the source of moral obligation, while the other governs all other operations of created things and is the source of physical necessity. In the minds of the Schoolmen these two parts were combined into a single whole by the conception of God as the ruler and lawgiver of the universe. Modern science, however, either rejects this conception altogether, or else disregards it as irrelevant. The result is that the unity of the old Scholastic *lex aeterna* has disappeared. It is now a commonplace of modern thought that between the physical law of nature and all other laws (including the moral law of nature if any such there be) there is a merely verbal relation. As applied to the operations of inanimate nature, the term law has come to mean nothing more than the expression of a general principle. The laws of nature are merely the formulas in which are expressed the uniformities of nature. Nevertheless it is true, and is a curious fact in the history of words and ideas, that the natural law, or (to use its Greek equivalent) the physical law, of the modern scientist, derives its origin from the *φυσικὸς νόμος* of the Stoics through the *lex aeterna* of the Schools.

The system formulated by Aquinas, and repeated after him by Soto and Suarez and a score of less celebrated doctors, long ruled the juridical thought of Europe². In the first years of the seventeenth century, however, we hear the beginning of a new way of thinking, and the writings of Grotius on the Continent, and of Hobbes in England, mark the commencement of modern ethics and jurisprudence. A characteristic feature of the new epoch is the gradual enfranchisement of these sciences from the bondage of

¹ Summa, I. 2, q. 95, art. 2.

² As for English literature, we may see an eloquent expression of these Scholastic doctrines in the first book of Hooker's Ecclesiastical Polity.

theology, and this separation was not without its effect on that doctrine whose history we are now tracing. The theological theory of natural law tends more and more to give place to a rival type of doctrine which may be distinguished as the metaphysical. Though rarely rejecting as actually invalid the Scholastic conception of the divine will as legislative, philosophers begin to disregard it as at least irrelevant in a secular science, and to seek another and independent source for the precepts of natural law. This source is the rational nature of man. The ancients derived this law from the universal nature; mediæval theologians from the divine nature; modern philosophers from human nature. As the system of Aquinas may be taken as the type of the theological theory, so the doctrine of Kant is the most perfect example of the metaphysical. Before examining this doctrine, however, it will be advisable to glance briefly at the views expressed by Grotius and Hobbes, the founders of the new order. More than this we cannot do, for the conception of a law natural pervades the whole of the ethics and jurisprudence of the seventeenth and eighteenth centuries, and to write its history would be to write that of those sciences.

'Natural law,' says Grotius, 'is the dictate of right reason indicating that any act from its agreement or disagreement with the rational nature of man (*cum ipsa natura rationali*) has in it a moral turpitude or a moral necessity, and consequently that such act is forbidden or commanded by God the author of nature. Acts concerning which there is such a dictate are either obligatory or illicit in themselves, and are therefore understood as necessarily commanded or forbidden by God, and in this respect natural law differs not only from human law but from positive divine law¹.' The exposition, and probably the thought, of Grotius is confused by his use of *jus naturale* as equivalent both to *justitia naturalis* and to *lex naturæ*—an inconvenient recurrence to classical usage and departure from the more accurate nomenclature of the Schools—and we must beware of unduly estimating the extent of the advance effected by him who has been called the restorer of the science of natural law. We may trace, however, in his doctrine the tendency already indicated as characteristic of the new era. According to the Scholastic theory hitherto prevalent, the divine command is the sole source of natural obligation, while by Grotius the obligation proceeding from such command is apparently regarded as merely accessory, being superadded to an independent obligation which has its source in the *dictatum rectæ rationis*, this dictate being itself the *lex naturæ*.

'The law of nature,' says Hobbes, 'that I may define it, is the

¹ De Jure Belli ac Pacis, i. 1. 10. 1.

dictate of right reason conversant about those things which are either to be done or omitted for the constant preservation of life and members as much as in us lies¹. He sees clearly, however, that this dictate of reason is no law properly so called; he is no adherent of the metaphysical school. 'These dictates of reason men use to call by the name of laws, but improperly, for they are but conclusions or theorems concerning what conduceth to the conservation and defence of themselves; whereas law properly is the word of him that by right hath command over others. But yet if we consider the same theorems as delivered in the word of God that by right commandeth all things, then they are properly called laws².' Hobbes, therefore, while admitting the validity of the theological conception, leaves it in the background of his thought; in his formal definition of natural law it does not appear, and to a very large extent he works out his ethical and political system without recourse to it. He is the forerunner, not of the metaphysicians, but of the sceptics who deny that in any proper sense of the term law there is any such thing as natural law at all.

In the system of Kant, the law of nature, or, as he prefers to call it, the moral law³, appears as the categorical imperative of the practical reason. It is not difficult to recognize under this new disguise the conception already so familiar to us. Law, for Kant as for everyone else, is a command; but he expresses this in his own way by saying that it is 'a proposition which contains a categorical imperative⁴.' That the law of nature is the command or dictate of reason was already familiar doctrine in the time of Cicero; Aquinas and the Schoolmen taught it, and from their day to that of Kant himself it had not been rejected or forgotten. Scholastic philosophy, moreover, had already adopted and applied in this connexion the Aristotelian distinction between the speculative and the practical reason—the end of the former being the true, and that of the latter the good. 'Lex,' says Aquinas, 'est quoddam dictamen practicae rationis⁵.'

The element of originality in Kant's system is his unreserved acceptance of what I have called the *metaphysical* doctrine of natural law. When Aquinas says that this law is the dictate of the practical reason, he means primarily the reason of God, not of

¹ De Cive, ii. 1.

² Leviathan, ch. 15.

³ In strictness of speech, natural law is, in the language of Kant and others, merely one portion of the moral law, that portion namely which declares and enforces natural right in the limited sense, which we shall shortly have occasion to consider. The distinction, however, does not here call for notice. See Hastie's *Philosophy of Law* (a translation of Kant's *Rechtslehre*), p. 33.

⁴ Hastie, p. 37.

⁵ Summa, I. 2, q. 91, art. 3.

man—'ratio videlicet gubernativa totius universi in mente divina existens¹.' Human reason is not *per se* possessed of legislative authority, but is merely the secondary source of the law of nature, as being the means by which such law is revealed to man. Kant, however, proclaims a new doctrine of the autonomy of the reason or rational will of man. The human practical reason is a law-giving faculty, and its commands constitute the moral law. 'This law,' he says, '... is the single isolated fact of the practical reason announcing itself as originally legislative. *Sic volo sic jubeo*. Reason is spontaneously practical and gives that universal law which is called the moral law².' From this moral or natural law proceeds moral or natural obligation, as most of his predecessors likewise taught. 'Obligation is the necessity of a free action when viewed in relation to a categorical imperative of reason³.' This legislative action of the practical reason Kant distinguishes as internal legislation, opposing it to that external legislation to which all other species of law are due. All legislation is 'either prescribed *a priori* by mere reason or laid down by the will of another⁴.' The theological conception he admits as valid but treats as merely accessory. 'The law which is imposed on us *a priori* and unconditionally by our own reason may also be conceived as proceeding from the will of a supreme lawgiver or the divine will⁵.'

To the influence of Bentham and his followers is chiefly due the almost complete discredit into which in England the doctrine of natural law has fallen. Till the days of Kant on the Continent and of Bentham in England, there was no very striking discordance between English and Continental jurisprudence. It is not possible to draw any sharp line of distinction between the teaching of Hobbes, Locke, Cumberland and Blackstone on one side of the Channel, and that of Grotius, Puffendorf, Spinoza, Thomasius and Wolff on the other. All were the inheritors of the same traditions. The acceptance, however, of Kant's metaphysical theory on the one hand, and of Bentham's sceptical theory on the other, established between English and Continental juridical and ethical thought a wall of separation that has not yet been broken down. 'Touching your theory of a law of nature,' says the disciple of the English philosopher, 'so far as its theological interpretation is concerned, it is impossible to say whether there is any such law or not; and if it does exist, there are no means of knowing its

¹ Summa, I. 2, q. 91, art. 1.

² Semple's *Metaphysic of Ethics* (a translation of Kant's ethical and juridical writings), p. 98; third ed.

³ Hastie, p. 29.

⁴ Ibid. p. 20.

⁵ Ibid. p. 37.

contents; we must be content to base our science on a human foundation. And as to the metaphysical form of this doctrine, it is manifest to the meanest understanding that natural law is a mere fiction, a metaphor mistaken for literal truth. Natural right I understand; but as for a natural law by which the observance of such right is commanded and made obligatory—what is it save a delusion and a snare?’ Benthamism, then, is a protest against what we may term juridical ethics—the illegitimate infusion into the science of right of conceptions derived from the science of law. The instrument of this infusion is the doctrine of a law of nature, and if this doctrine is seldom encountered in modern English thought under its proper name, its covert influence can still be traced in much of our ethical speculation.

So far we have dealt almost exclusively with one only of the two elements united in the term *jus naturale*. Let us now leave the conception of natural law, and consider the related conception of natural right. There, too, we find a striking discrepancy between English and Continental thought. The English term *right* embraces the whole sphere of good conduct; it includes the practice of all the virtues, and the performance of all duties. The corresponding German terms, *Recht* and *Naturrecht*, on the contrary, include merely one portion of good conduct, the residue being covered by the terms *Tugend*, *Sittlichkeit*, *Moralität*. Similarly, the French *droit* and *droit naturel* are opposed to *moralité*. This distinction between *Recht* and *Moralität*, *droit* and *moralité*, must not for a moment be confounded with our own familiar distinction between law and morals. It is a distinction within the sphere of morals itself. It is current doctrine on the Continent that the science of ethics is capable of a fundamental division into two parts, one of which deals with *le droit*, the other with *la moralité*. The former part of the science is called *jurisprudence* or *Rechtslehre*; the latter, *Morale*, *Tugendlehre*, or *Elhik* (in a narrow sense). Great and manifold have been the efforts made by philosophers to discover and establish the exact nature of this distinction, and, although all agree that it exists, it is impossible to state it in a form that will apply to all the varying accounts that have been given of it. One element in the distinction is, however, common to almost all expositions of it, and by this we shall define it. *Droit* is that part of right conduct which is of such a nature as rightly to admit of external enforcement and constraint; *moralité* is that part which cannot properly be exacted by force, but must be left to the free will of each individual. Now we English know, of course, as well as our neighbours, that every species of right conduct cannot rightly be exacted by force, but we recognize that the question of the

possibility or advisability of such enforcement is one to be decided in accordance with the empirical dictates of expediency in each particular case; that what is enforceable to-day may not be enforceable to-morrow; and that duties enforceable in one way may not be enforceable in another. But Continental thought has striven to lay down some far-reaching general principle, sharply dividing the sphere of right conduct into two parts—a principle from which the enforceability of one of these parts and the non-enforceability of the other may be logically and infallibly deduced.

It can scarcely be doubted that in this difference between English and Continental thought we may trace the influence of that difference between the languages expressing such thought, to which reference was made at the beginning of this essay. The English *right*, being unaffected by any juridical implications, covers the whole field of ethics. But the French *droit*, and the German *Recht*, have both an ethical and a juridical application, and the former is affected and limited by the latter. *Recht*, in the sense of law, covers only a portion of right conduct: that part, namely, which is *actually enforced*. Naturally enough, therefore, *Recht*, in its ethical application (i.e. *Naturrecht*), is similarly restricted, and covers only that portion of right conduct which is *rightly capable of enforcement*. *Recht*, in its ethical sense, is confined to that part of right which is in the most direct relation with *Recht* in its legal sense.

There is no precise equivalent in our language for the expression of this distinction between *droit naturel* and *moralité*, *Naturrecht* and *Sittlichkeit*. We may employ for this purpose, however, the terms justice and virtue. In so doing, we give to the term justice a much more precise and definite signification than that usually possessed by this very vague expression; we shall, however, be historically accurate in making this use of it, for, as we shall see, the distinction with which we are now dealing is historically a product of the mediæval theory of *justitia*, and, indeed, the French language still uses *droit* and *justice* as synonymous. If we venture to employ the terms jurisprudence and ethics in this connexion, it will be remembered that it is in their Continental and not in their English sense; jurisprudence will mean the science, not of law, but of justice (natural and positive); ethics, the science, not of right conduct in general, but of a particular part of it.

Pertaining to the distinction now under consideration, is that between perfect and imperfect rights and duties. A perfect duty is one belonging to the sphere of justice; it is perfect as admitting of enforcement. An imperfect duty belongs to the sphere of virtue. The former is *Rechtspflicht*, the latter *Tugendpflicht*. Similarly in the

case of rights. According to many writers, however, an imperfect right is not really a right at all, rights being restricted to the department of justice.

The history of this distinction between perfect and imperfect rights and duties, justice and virtue, jurisprudence and ethics, is interesting and instructive, but too long and intricate to be here discussed. Suffice it to say that the first beginnings of the doctrine are traceable in the form given to the Aristotelian theory of justice by the Schoolmen and mediaeval theologians, and that in the writings of Grotius, Puffendorf, Leibnitz, Thomasius, and most of the other founders of modern juridical science, it occupies a more or less important place. It is to the influence of Kant, however, that we must attribute the prominence of the distinction in modern thought, and to his account of it a few words may be profitably devoted. 'Moral philosophy (*Metaphysik der Sitten*),' he says, 'is divisible into two parts: (1) the metaphysical principles of jurisprudence (*Rechtslehre*), and (2) the metaphysical principles of ethics (*Tugendlehre*)¹.' 'Jurisprudence has for its subject-matter the aggregate of all the laws which it is possible to promulgate by external legislation².' 'All duties are either duties of justice (*Rechtspflicht*) or duties of virtue (*Tugendpflicht*). The former are such as admit of external legislation; the latter are those for which such legislation is not possible³.' External legislation is, as we have already seen, that by which one will imposes laws upon another, as opposed to that internal legislation of the autonomous will by which man imposes a law upon himself. To say, then, as Kant does, that jurisprudence deals with those duties which may be promulgated by external legislation, is merely to repeat the already familiar distinction between duties which are, and duties which are not, rightly capable of external enforcement. 'The essential distinction between duties of justice and duties of virtue is, that in the case of the former, external enforcement is morally possible, while the latter must be left to free self-determination⁴.' What then are those duties of justice? They are all summed up in the duty of not interfering with the liberty of others. Freedom of external action is the end of all external legislation; and the conditions of such freedom, so far as it depends on the human will, constitute the sphere of justice and the subject-matter of jurisprudence. 'The universal law of justice (*allgemeines Rechtsgesetz*) may then be thus expressed: Act externally in such a manner that the free exercise of thy will may be able to coexist

¹ See Hastie's *Philosophy of Law*, p. 3.

² *Ibid.* p. 43.

³ *Ibid.* p. 24.

⁴ See Semple's *Metaphysic of Ethics*, p. 198.

with the freedom of all others according to a universal law¹. The reason why duties of justice, as thus defined, admit of external enforcement, is that such enforcement, being, as Kant says, 'a hindering of a hindrance of freedom,' is consequently in favour of freedom, and therefore just. Hence, 'all justice is accompanied with an implied title or warrant to bring compulsion to bear on any one who may violate it in fact².' The law of justice, moreover, looks only to the outward act, and therefore compulsion is possible; while the law of virtue, on the contrary, looks to the motive as well as to the act—no act being virtuous unless done for the sake of virtue—and a man's motives are beyond the reach of compulsion. The precepts of justice are mostly negative—they merely guarantee to each a sphere for the external exercise of his will. The precepts of virtue, on the other hand, know no such limitation.

The foregoing is a typical example of a distinction which, in varying forms, pervades all modern juridical speculation on the Continent, and strikingly differentiates it from the corresponding department of thought amongst ourselves. It would be tedious and unprofitable to examine, in such cursory fashion as space permits, any further instances of the doctrine in question, but I trust that enough has been said to indicate its general nature. A glance at any French or German work on natural law, such as Ahrens's *Cours de Droit Naturel* or Trendelenburg's *Naturrecht auf dem Grunde der Ethik*, will reveal the importance attributed to the discovery of the exact nature, limits, and relations of *le droit naturel*.

It remains to say a word touching the relations between *droit naturel* or *Naturrecht* in the sense of natural law, and the same term in the sense of natural justice. There is no necessary connexion between the two doctrines. It is quite possible to accept the theory of a law of nature as opposed to the positive laws of men, without at the same time accepting the doctrine of natural justice as opposed to virtue. And, conversely, we may be strenuous adherents of the distinction between ethics and jurisprudence, and, nevertheless, deny or disregard the existence of a law of nature. This position, indeed, seems to have been already reached by much of modern speculation. The old twofold signification, partly ethical and partly juridical, has largely disappeared in favour of a conception purely ethical, and in many of the theories of *droit naturel* and *Naturrecht* encountered at the present day, there is but little trace remaining of that juridical element which was of old time so prominent. *Lex naturae* has given place to *justitia naturalis*.

¹ Hastie, p. 46.² Ibid. p. 47.

The history of doctrine is profitable for little unless it points out to us the way of truth. What conclusion, then, are we to draw touching the validity of these time-honoured conceptions of natural law and natural right? So far as the law of nature is conceived as having its ultimate source in the divine will, criticism of such doctrine pertains of course rather to theology than to ethics or jurisprudence. This aspect of the matter, therefore, we shall here neglect, remarking merely that the validity of the conception of the divine will as legislative admits of adverse argument, even from the standpoint of theology itself¹. As far as secular science is concerned, the history of the doctrine of natural law is for the most part but a chapter in the history of human error. Not by the aid of any such conception shall we be enabled to read the riddle that has perplexed philosophy from the days of Plato until now—to refute the thesis of Carneades that *summa justitia* is *summa stultitia*, and to prove that the path of righteousness is that of wisdom also. It is time to leave what I have called juridical ethics behind us in the progress of thought, and to realize clearly that the notions of law and obligation pertain, in their full and proper sense, merely to positive right in its various branches, and are, in the sphere of natural right, but mocking and misleading echoes. If we continue to speak of natural law in ethical speculation (and it is probably convenient that we should), we must perform upon that term the same operation that has already been performed upon the natural law of the physicist; that is to say, we must eliminate from it the conception of command and enforcement and the derivative notion of obligation or moral necessity. Natural law must be used by the moral philosopher as meaning nothing more than the principles of natural right; just as the natural law of the physical philosophers has come to mean nothing more than the principles in which are formulated the uniformities of nature. This we may term, in contrast to the theological and metaphysical types of doctrine, the declaratory theory of natural law. A law commanding the right is a fiction; a law declaring the right is a fact; and only so far as this distinction is borne in mind, will much progress be made in ethical speculation.

Turning from natural law to that other doctrine indicated by the term *jus naturale*—the distinction, namely, between justice and virtue, between perfect and imperfect rights and duties, between jurisprudence and ethics—no detailed criticism thereof is here possible. Nor is the matter one of much urgency for Englishmen, for the doctrine is one that in England has never obtained secure

¹ The denial of it constitutes a novel and noteworthy feature in the system of Spinoza.

foothold. At one time, indeed, on the authority of Puffendorf, Thomasius and others, it received from English writers a half-hearted assent. But, although on the Continent it flourished exceedingly, and grew to great credit and influence in the moral sciences, yet in England it was ever an exotic, receiving no support from popular speech, and withering presently away. Curiously enough, however, it has quite recently been regenerated in the writings of Mr. Herbert Spencer, who, in his work on *Justice*, has formulated this doctrine in a manner closely analogous to that adopted by Kant—the conclusions of the English philosopher being, however, as he himself informs us, attained in complete independence of those of his German predecessor. Notwithstanding the credit to be attached to a doctrine that has shown this capacity of resurrection, we may be permitted to doubt its truth, and to consider that, in the rejection of it, English thought has done well. It would seem that in this matter Continental theory has been led astray by the words that have been its instruments, and that, in this department at least of speculative thought, we are in a position to teach our neighbours rather than to learn from them.

JOHN W. SALMOND.

FREEDOM OF CONTRACT IN MORTGAGES.

'IT is a very interesting question, and one which I certainly do not consider as at present finally settled, how far the abolition of the laws against usury has affected the jurisdiction or the extent to which the court will exercise its jurisdiction as between mortgagor and mortgagee¹.'

Ever since the doctrine was established that a mortgage deed was not in reality, what it was and is in form, an absolute conveyance subject to the proviso for reconveyance on the happening at a certain time of a certain event, the Court of Chancery has exercised a 'paternal jurisdiction' in favour of the mortgagor. Before the close of the last century, by a long series of decisions, many of which are to be found in Vernon's reports, it was settled that, whatever might be the form of the document or documents or the nature of the stipulations contained in it or them, if the transaction was in its essence a mortgage or a loan upon security, the borrower was entitled to redeem the property comprised in the mortgage on payment of the principal sum advanced and interest and costs, and that 'a man shall not have interest for his money and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement.' In particular, the following stipulations, either contained in the mortgage deed or made at the time the money was advanced, have been held to be void; that no one but the mortgagor and the heirs male of his body should be admitted to redeem the mortgage²; that the right to redeem should be confined to the lifetime of the mortgagor³; that unpaid interest should be capitalized and interest paid upon it⁴; that the mortgagee should receive the rents with a commission⁵; that the mortgagor should not pay the mortgage money or institute any proceedings to redeem for twenty years⁶; that the mortgagees who were auctioneers should receive a commission upon the sale of the property⁷, &c.

This interference by the courts of equity with the contracts made

¹ *Mainland v. Upjohn*, 1889, 41 Ch. D. p. 138, per Kay J.

² *Howard v. Harris*, 1683, 1 Vernon 190, Lord Keeper North.

³ *Kilvington v. Gardner*, cited in *Howard v. Harris*.

⁴ *Chambers v. Goldwin*, 1804, 9 Ves. 271, 7 R. R. 181, Lord Eldon C.

⁵ *Langstaffe v. Fenwick*, 1805, 10 Ves. 405, 8 R. R. 8, Grant M.R.

⁶ *Coudry v. Day*, 1859, 1 Giff. 316, Stuart V.-C.

⁷ *Broad v. Selfe*, 1863, 11 W. R. 1036, 9 Jur. N. S. 885, Romilly M.R.

by persons competent to manage their own affairs, under independent advice, and without any trace of undue influence, fraud or pressure, is an exception to the general rule 'modus et conventio vincunt legem.' The late Lord Bramwell spoke as follows in advising the House of Lords in the year 1891. 'There is a further equitable rule which seems to be this, that this right of redemption shall not even by bargain between the debtor and creditor be made more burdensome to the debtor than the original debt, except so far as additional interest and expenses consequent on the debt not having been paid at the time appointed may have occurred or arisen. That any agreement making such right of redemption more burdensome is void . . . As Bowen L.J. says: "Equity will permit of no attempt to clog fetter or impede the borrower's right to redeem and recover what may still remain in equity his own." I cannot understand this. The right of redemption may be sold to any one—to the creditor after the loan. Why may it not be dealt with by debtor and creditor at the time of the loan? It cannot. It seems that a borrower was such a favourite of courts of equity that they would let him break his contract and perhaps, by preventing him from binding himself, prevent him from contracting upon the terms most advantageous to himself¹.' The usury laws were in force when the Court of Chancery assumed the jurisdiction of interfering in favour of the borrower, and it is probable that the Chancellors were of opinion that they were acting in agreement with the policy of the legislature, in limiting the obligations which the mortgagee could impose upon the mortgagor. Stipulations clogging the right of redemption were regarded as devices to obtain more than the legal rate of interest, and as attempts to evade the spirit of the laws against usury. Lord Eldon in *Chambers v. Goldwin*² and Lord Romilly in *Broad v. Selfe*³ trace the exercise of the jurisdiction to this source.

The usury laws were curtly abolished by 17 & 18 Vict. c. 90. 'The several acts and parts of acts mentioned in the schedule hereto and all the existing laws against usury shall be repealed.' It is now legal for the lender to exact from the necessitous borrower the payment of an extravagant rate of interest. The foundation of the 'paternal jurisdiction' being thus removed, it would seem right that the judges should cease to interfere with the contracts made by borrowers and lenders of money upon the security of immoveable property. 'Cessante ratione cessat et ipsa lex.'

¹ *Marquess of Northampton v. Salt*, '92, A. C. p. 19.

² 1804, 9 Ves. 254, Lord Eldon said, 'There is nothing unfair or perhaps illegal in taking a covenant originally that if interest be not paid at the end of the year it shall be converted into principal. But this court will not permit that as tending to usury, though it is not usury,' p. 271.

³ 1863, 11 W. R. 1036.

In all other transactions except those by way of mortgage the tendency of the courts at the present day is first to discover what contract the parties intended to make, and then, in the absence of the recognized grounds of defence (mistake, fraud, duress, &c.), to hold them to that contract, however unreasonable or improvident one or other of its terms may be. The late Lord Bramwell declared that he could not understand why a different rule should be applied to the contract of mortgage. What principle of abstract justice is violated if the mortgagee exacts as part of the price of the loan, and the mortgagor agrees to, one or other of the stipulations which have been held to be void as clogging or fettering the equity of redemption? If the mortgagor is unwilling to accept the terms offered by the mortgagee he can decline the contract and attempt to obtain the loan elsewhere.

An examination of the cases will show how far since the repeal of the usury laws the judges have shown any inclination to modify the rule settled by the more ancient cases.

In *Potter v. Edwards*¹ the suit was instituted for the redemption of a mortgage executed in 1855 to secure £1000 and interest at 5 per cent. The receipt was signed for £1000, but in fact the plaintiff only received £700. The plaintiff tendered £700 to the defendant, but the latter refused to be redeemed except on payment of the full sum of £1000. The defendant stated in his answer and proved by evidence that he had been very unwilling to make the loan upon the proposed security, but upon being pressed with great importunity to do so he had offered to advance £700 only upon the terms of having a mortgage for £1000, the balance of £300 being a bonus proportionate to the risk. Kindersley V.-C. gave judgment for the defendant. 'The deed appears to me to be exactly what the parties intended it to be, that is a security for £1000 upon having an advance of £700. It is true that in an ordinary case where there is a mortgage for £1000, and it is proved that £700 only has been advanced, the Court will allow it to stand for £700 only, but in this case there is uncontradicted evidence of an arrangement to a different effect.'

In *Broad v. Selfe*² the mortgagees were auctioneers. The mortgage deed, which was executed after the repeal of the usury laws, contained a stipulation that the mortgagees might, if the property were sold, retain out of the proceeds of sale a commission of 5 per cent. on the amount realized, and that if the mortgagor paid off the debt the mortgagees should receive a commission of 5 per cent. on the value of the property. The Master of the Rolls held this stipulation to be void. 'The contract in this case was only a contract of

¹ 1857, 26 L. J. N. S. Ch. 468.

² 1863, 11 W. R. 1036.

mortgage to the extent of £200 and interest, but not beyond this. —The cases referred to, and several others which I have consulted, show the principle that the court would not permit a person under the colour of a mortgage to obtain a collateral advantage not belonging to or appurtenant to the contract of mortgage. Although this principle in its origin probably had reference to the usury laws, it went in my opinion beyond them, and is not affected by their repeal.' That is an emphatic statement that a stipulation for a collateral advantage is not permitted, notwithstanding the repeal of the usury laws.

Stuart V.-C. in *Barrett v. Hartley*¹ decided that certain sums charged in the accounts by a mortgagee in possession, by way of bonus for valuable services rendered to the mortgagors, must be disallowed on the grounds that the mortgagee was also a trustee, and that there was evidence 'of circumstances of pressure and difficulty' on the part of the plaintiffs, which had caused them to consent to the charges at the time they were made. On the question discussed in this paper the Vice-Chancellor spoke as follows: 'Cases have been referred to in which with reference to the law of mortgagor and mortgagee, when the usury laws existed, where there was a clear and decided contract for a loan at a certain rate of interest, the Court would not permit a mortgagee to obtain a collateral advantage under the shape of commission for collecting rents, or of a bonus, or by whatever other name it might be called, from the mortgagor, or anything beyond the terms of the contract. Nor even under the contract when it was an exaction beyond that limit which the court would permit. It is perfectly true that such cases were cases when the usury laws were in existence, and when it was said that such bargains by a mortgagee for some advantage beyond the legal interest stipulated for in the deed would be a cloak for usury.' The last words imply that in the opinion of the Vice-Chancellor the repeal of the usury laws would enable the court to declare valid stipulations which previous thereto would have been held void as a 'cloak for usury.'

In *Clarkson v. Henderson*² by a mortgage executed in 1865, the tenant for life and the remaindermen assigned certain property to secure repayment of £872 and interest, with a proviso that interest in arrear more than twenty-one days should be capitalized and bear interest after the same rate. The question was discussed whether the mortgagees were entitled to capitalize the interest under this proviso. It was contended for the mortgagors that 'it was against the policy of the law for a mortgagor to enter into such a covenant for capitalizing interest in arrear; it was so before the abolition of

¹ 1866, L. R. 2 Eq. 785.

² 1880, 14 Ch. D. 348.

the usury laws, and the repeal of those laws has made no difference in this respect.' But Hall V.-C. held without any difficulty that the security given by the mortgagors for compound interest was good.

In the early part of 1889 Kay J. delivered two judgments dealing with the point now discussed, which show clearly that at that time he had come to no settled conclusion and that he considered the question open for discussion. In the first case *James v. Kerr*¹ the plaintiff desired to establish his claim to an interest in the real estate of an intestate. Being without funds he borrowed money from the defendants, his solicitors, and in 1884 executed a mortgage whereby he covenanted to repay the money advanced, and agreed to pay the defendants £225 by way of bonus if by any means his title to any part of the real estate should be established, and he charged his interest in the real estate with the advances, interest thereon, and the bonus of £225. The plaintiff succeeded in establishing his claim to the real estate, and now claimed to redeem the same upon payment of the money actually advanced and interest thereon, and he asked for a declaration that the agreement to pay the bonus was void. Kay J. held (1) that the mortgage was tainted with champerty, (2) that the agreement to pay the bonus was an illegal advantage stipulated for by the mortgagee, and (3) that the transaction was voidable as an undue advantage obtained from the plaintiff while he was in the position of an expectant heir. On the second point the learned judge quoted the case of *Broad v. Selfe*² and said, 'I believe with Lord Romilly that the rule that a mortgagee should not be allowed to stipulate for a collateral advantage beyond his principal and interest did not depend upon the laws against usury. Considering how completely the mortgagor is in the power of the mortgagee, and the great facilities which courts of equity have always given for the recovery of the loan and the realization of the security, I think it is important to preserve the simplicity of the mortgage transaction and not to clog the redemption by stipulations of this kind. It seems to me inexpedient and I should regret that the old rule should be altered.' This judgment was delivered on January 14, 1889, and it will be noticed that the defendants were solicitors dealing with their client, that on the first and third points discussed in the case the learned judge was in favour of the plaintiff, that on the merits the defendants could not contend with success that the parties had contracted on equal terms, and that *Potter v. Edwards*³ was not cited. However this may be, three weeks afterwards on February 5, 1889, *Mainland v. Upjohn*⁴ stood for judgment before the same learned judge. In the

¹ 1889, 40 Ch. D. 449.

² 1867, 26 L. J. N. S. 468.

³ 1863, 11 W. R. 1036.

⁴ 1889, 41 Ch. D. 126.

latter case the defendant, a young solicitor, had advanced money to the plaintiff, an experienced builder, upon securities of a speculative character. At the time of the loans, money had been deducted by way of bonus from the amounts stated in the mortgage deeds and retained by the lender. The Court held that sums actually deducted at the time of the loan by way of commission or bonus must be allowed to the mortgagee in taking the redemption accounts. *Potter v. Edwards*¹ was cited and influenced the decision. Kay J. said, 'If the mortgagor has been deceived or is taken by surprise, or there has been any oppression or improper dealing in the matter, there is ample equity of course to set it right on that ground; but if both parties know previously what they are doing, and this is voluntarily done and in pursuance of a deliberate bargain, how a mortgagor can possibly say to a mortgagee, "Pay that money back to me," I cannot conceive. It is impossible. The money can only be recovered when it has been paid over under a mistake of fact or under some pressure—some advantage taken of the payer which disentitles the payee to retain the money. But where no such advantage has been taken, where there has been no such improper pressure, if the parties are on equal terms, all I can say is that the money in such a case as that must be treated as having been actually paid by the mortgagor to the mortgagee as an inducement to lend the rest of the amount: and then I conceive the mortgagor has no right to recover it, nor has he any right to complain that the whole amount is charged against him in the mortgage deed.' The learned judge found as a fact that having regard to the mortgagor's long experience in transactions relating to building loans, and the mortgagee's youth and comparative inexperience in such matters, it was clear that the mortgagor was perfectly able to take care of himself, and that the case was in no sense one of oppression, unfair dealing, or imposition, on the part of a mortgagee.

In the result it is submitted that there is no real opposition in the judgments in *James v. Kerr*² and *Mainland v. Upjohn*³, and that the combined effect of the two cases may be thus expressed: since the repeal of the usury laws, the Court ought to examine carefully agreements between mortgagor and mortgagee whereby the equity of redemption is clogged or fettered by any agreement securing a collateral advantage to the mortgagee; but if a careful examination of the facts leads to the conclusion that the parties have contracted on equal terms, and that there is no evidence of 'oppression, unfair dealing, or imposition on the part of the mortgagee,' the Court ought to enforce the contract, however unwise and improvident it may be, deliberately entered into by mortgagor

¹ 1867, 26 L. J. N. S. Ch. 468. ² 1889, 40 Ch. D. 449. ³ 1889, 41 Ch. D. 126.

and mortgagee in the same way and to the same extent as the Court is accustomed to enforce contracts made by persons who are not in the position of mortgagor and mortgagee.

The last case to which it is necessary to refer is the *Marquess of Northampton v. Pollock*¹. Lord Compton, the son of the plaintiff in the action, borrowed £10,000 from the defendants, and as security for the loan he executed a bond and covenanted to repay the loan with interest, and charged his reversionary interest in real estate to which he was entitled on the death of his father with the repayment of the money. This security would be worthless if Lord Compton predeceased his father, and therefore the parties agreed in writing that the lenders should insure the life of the borrower against that of his father for the sum of £34,500: the premiums payable in respect of the policy were to be paid in the first instance by the lenders, but were to be charged in the accounts against the borrower, and it was provided that, in the event of the borrower predeceasing his father without having repaid to the lenders the sums due in respect of the loan, the policy and all moneys secured thereby should be the property of the lenders. This event happened. The borrower received the sum of £10,000, the policy was taken out by the lenders, the borrower made no payment in respect of interest on the sum borrowed or of the premiums on the policy, and died in the lifetime of his father. The latter as administrator of his son brought this action against the lenders, alleging that the transaction was in its essence a mortgage, and claiming that he was entitled to redeem the policy on payment to the lenders of what should appear to be due to them on taking the accounts as between mortgagor and mortgagee, and that the provision that in a certain event (which happened) the policy was to be the property of the lenders was void as an 'agreement limiting the mortgagor's right of redemption to his lifetime.' In the Court of Appeal and in the House of Lords the lenders had the assistance of Lord Davey and Rigby L.J., and the principal point argued by those eminent counsel was that an accurate analysis of the facts of the case and of the documents showed that the transaction was not one of mortgage, and that the doctrine that an agreement limiting the mortgagor's right of redemption was void was not applicable. With this view the late Lord Bowen in the Court of Appeal, and the late Lord Hannen in the House of Lords agreed, but the majority in both courts held otherwise. But it is worthy of note, though it tells against the argument presented in this paper, that Lord Davey and Rigby L.J. did not think it worth while to argue with persistence before the Court of Appeal that the equitable

¹ 1890, 45 Ch. D. 190; '92, A. C. 1.

doctrine as to the right of the mortgagor to redeem was in any way shaken by previous decisions. In the Court of Appeal Cotton L.J. said, 'I need not quote authorities that courts of equity never will allow the equity of redemption to be cut off except by force of time or the order of the Court. The mortgagor must be foreclosed if he does not redeem.' And Lindley L.J. added, 'The attempt to confine the right to redeem the policy in point of time is, I think, opposed in principle to a long series of authorities which I am not at liberty to question.' In the House of Lords the latter part of the argument of the counsel for the appellants is directed to the point here discussed, and *Newcomb v. Benham*¹ was cited. In that case lands were conveyed to be redeemable upon payment by the grantor of £1,000, and interest at any time during his lifetime, with a covenant by the grantor that in case the lands should not be redeemed in his lifetime they should never be redeemed. The Lord Keeper North reversed the decision of the Earl of Nottingham and held that this covenant was valid, basing his decision on evidence which proved that 'the grantor intended a benefit and kindness to the mortgagee in case he should not think fit to redeem this estate in his lifetime.' The House of Lords affirmed this decision, but the case is in direct opposition to a long series of cases decided before the repeal of the usury laws, and is interesting as showing that the equitable doctrine here discussed was not adopted without difficulty as a hard and fast rule applicable to all cases of mortgage, rather than as an authority against the doctrine itself. In the course of his judgment in the Marquess of Northampton's case², Lord Selborne said, 'I am not prepared to hold that if it were made out that the policy was effected for the creditors' benefit subject only to an option for the debtor to acquire a right in it by making a payment which he never made, the obligation of paying the premiums which the debtor certainly undertook would have made it the property of the debtor contrary to the contract. I see no principle on which I ought so to hold since the repeal of the usury laws, and in the absence of any allegation or proof of fraud, oppression, or other unfair dealing.' Lord Bramwell used the expressions quoted on a previous page, and at the end of his judgment in favour of the plaintiff in the action said, 'I regret to have to come to this decision. I think the equitable rule unreasonable, and I regret to have to disregard the express agreement of a man perfectly competent and advised by competent advisers.' The effect of this decision was that though neither Lord Compton nor the Marquess of Northampton ever paid a penny to the defendants, the former obtained from the defendants the sum of

¹ 1684, 1 Vern. 232 ; 2 Ventr. 384.

² '92, A. C. 1.

£10,000, and the latter obtained from the defendants the difference between the amounts due from Lord Compton's estate in respect of the loan of £10,000 plus the premiums on the policy and the sum of £34,500.

In the result since the repeal of the usury laws, there are on one side of the line in favour of freedom of contract between mortgagor and mortgagee the judgments of Kindersley V.-C. in *Potter v. Edwards*¹, of Stuart V.-C. in *Barrett v. Hartley*², of Hall V.-C. in *Clarkson v. Henderson*³, and of Kay J. in *Mainland v. Upjohn*⁴, and the remarks of Lord Bramwell in the *Marquess of Northampton v. Salt*⁵; and on the other side of the line the decisions of Lord Romilly M.R. in *Broad v. Selfe*⁶, of Kay J. in *James v. Kerr*⁷, and of all the courts in the *Marquess of Northampton v. Salt*⁸, that a conveyance by way of mortgage subject to a limited right of redemption is as impossible now as it was in the last century, and that the creditor will not be allowed to impose terms on the debtor other than those characteristic of and essential to the contract of mortgage.

Lord Davey in his argument for the mortgagee in *Mainland v. Upjohn*⁹ pointed out with great force that in the more modern cases, in which the ancient doctrine against clogging the equity of redemption with any by-agreement had been applied, there had been 'some independent and distinct ground of equity arising out of the relation of the parties': thus in *Broad v. Selfe*¹⁰ the mortgagees were auctioneers, in *Barrett v. Hartley*¹¹ the mortgagee was in possession and there was evidence of pressure on the mortgagor, and in *Cowdry v. Day*¹², *Eyre v. Hughes*¹³, *James v. Kerr*¹⁴, and *Field v. Hopkins*¹⁵ the mortgagee was the solicitor who had prepared the mortgage deed. It must be admitted that no such circumstance was present in the *Marquess of Northampton v. Salt*¹⁶, and the remarks of Cotton and Lindley L.JJ. are a strong authority that the old doctrine is still in full force.

Different minds will come to different conclusions on the question whether perfect freedom of contract should be allowed to mortgagor and mortgagee. But it is worthy of remark that, inasmuch as there is no legal limit to the rate of interest to be charged upon the loan, the mortgagee can in many cases, by exacting an excessive rate of interest, obtain the same result that would follow from an agreement to pay a moderate rate of interest and a stipulation

¹ 1867, 26 L. J. N. S. Ch. 468.

² 1880, 14 Ch. D. 348.

³ '92, A. C. 1.

⁴ 1889, 40 Ch. D. 449.

⁵ 1889, 41 Ch. D. 126.

⁶ 1866, L. R. 2 Eq. 785.

⁷ 1876, 2 Ch. D. 148.

⁸ 1890, 44 Ch. D. 524.

⁹ 1866, L. R. 2 Eq. 785.

¹⁰ 1889, 41 Ch. D. 126.

¹¹ 1863, 11 W. R. 1036.

¹² 1890, 45 Ch. D. 190; '92, A. C. 1.

¹³ 1863, 11 W. R. 1036.

¹⁴ 1889, 1 Giff. 316.

¹⁵ 1889, 40 Ch. D. 449.

¹⁶ 1890, 45 Ch. D. 190; '92, A. C. 1.

for the payment of bonus, commission or compound interest. This is expressed clearly in the argument of Lord Davey in *Mainland v. Upjohn*¹ and by Lord Bramwell in the *Marquess of Northampton v. Salt*². The latter said with reference to the facts in that case, 'Equity allows itself to be circumvented when it interferes with people's bargains. What Lord Compton has been charged is about 10 per cent. on the sum borrowed with compound interest. I suppose at his death the sum due from him was about £20,000. If he had agreed to pay the £10,000 and 10 per cent. interest, and there had been no agreement to insure, the appellants would have laid out half the annual amount for insurance, and on his death kept the sums insured. Can they be considered to have done that or its equivalent? The resulting figures would have been the same. I think not. The rules of equity may be evaded but must not be infringed³.' That is to say, if the appellants in that case had received better advice, the contract would have been drawn in such a form that, in accordance with the intention of the contracting parties, they would have been entitled to retain the money which, contrary to that intention, the plaintiff in the action claimed from them with success.

It is the general habit of the courts at the present time to go behind the form of the documents, and to decide the rights and liabilities of the parties according to their real intentions. If the mortgagee by moulding the form of that part of the contract dealing with the payment of interest with a due regard to the existence of the rule that the right to redeem cannot be clogged or fettered by any by-agreement, can impose the same liability on the mortgagor that would be imposed by exacting from the latter an agreement in the ordinary form to pay a moderate and usual rate of interest, and in addition a stipulation for some collateral advantage by way of bonus, commission, or compound interest, or some limitation of the right to redeem, is it worth while to insist on the continued application of a rule which can be evaded by the skilful and ingenious, and cannot operate except by defeating the intention of the parties to the contract?

ERNEST C. C. FIRTH.

¹ 1889, 41 Ch. D. 126.

² '92, A. C. 1.

³ The equitable rule forbidding the increase of the rate of interest in case of unpunctual payment of the interest is systematically evaded by the practice of the mortgagor agreeing to pay the higher rate, with a proviso that a lower rate will be accepted if the payments be made punctually on the day appointed.

LANDHOLDING IN COLONIAL NORTH CAROLINA.

IN 1663 His Majesty Charles II, out of the abundance of his American lands, granted the province of Carolina to eight of the chief nobles of his court. These gentlemen retained the property until 1729, when they sold it to the King. Here it remained until the War of the Revolution. Although these two supremacies, the one of the Lords Proprietors and the other of the King, represent two distinct periods in the history of the colony, they indicate but little interruption in the history of its private law. This is especially true of the law relating to land. The basis for the future government was the charter by which the Lords Proprietors received their property. When the purchase by the King was made, there was no beginning the government *de novo*. The Crown simply stepped into the place vacated by the former owners. Proprietary laws were for the most part confirmed or but slightly altered. We thus see the importance of the charter of 1663, and can understand why the people in their periodic revisions of the laws saw fit to insert this instrument as a preface to their codes. It is therefore from this charter¹ that we begin to trace the history of landholding in North Carolina.

Three facts relating to land stand prominently out in the royal charter. 1. Carolina was constituted a feudal seignior, the Proprietors being authorized 'to have, hold, use, exercise, and enjoy the same [their privileges], as amply, fully, and in as ample manner, as any Bishop of Durham, in our kingdom of England, ever heretofore had, held, used, or enjoyed, or of right ought or could have use or enjoy.' 2. The Lords were to hold their lands 'in free and common socage and not *in capite*, or by knight's service.' 3. They were to hold 'as of our manor of East Greenwich in Kent,' and to pay an annual rent of twenty marks, together with one-fourth of all gold and silver ore found within that region. This rent was a mere formality intended for a recognition of the King's ultimate dominion over the granted lands; still it is well to remember that it was eventually paid. At the time of the sale

¹ The first charter was issued in 1663. In order to include a strip of territory to the north of the province, a second charter was issued in 1665. Except as to boundaries it differs in no material sense from the charter of 1663, but being the later it may be considered the more authentic. We have therefore used it.

the Proprietors owed rent for seven and a half years, and that amount was deducted from the purchase price¹.

The charter² also prescribed the relation between the Proprietors and their future tenants. The Lords, so we read, may at pleasure 'assign, alien, grant, demise, or enfeof, the premises or any part, or parcel thereof, to him or them that shall be willing to purchase the same, and to such person or persons as they [the grantees] shall think fit, to have and to hold to them, the said person or persons, their heirs or assigns, in fee simple or in fee tail, or for terms of life, lives, or years; to be held of them [the Lords Proprietors] and not of us, our heirs and successors.' This grant involved a return to subinfeudation, and accordingly the King relaxed for the benefit of the Proprietors the statute *Quia Emptores*. To them also was accorded the right to erect seigniories and manors with the accompanying privileges of courts leet and barons. By way of being sufficiently explicit, the people who should settle in the colony were granted the right to hold their land on the above conditions, and were guaranteed the recognized personal and property rights of Englishmen.

The above-mentioned provisions represent one element in the development of the colonial land laws. That was the superimposed factor. It came from without. As it embodied the distinctive ideas of the promoters of the enterprise it may be called the Proprietors', or the King's, contribution to the process of growth which was about to begin. There was another factor, one due to the conditions of life in the colony. As this was interpreted and demanded by the people it may be termed the popular contribution to the same process. These two factors were brought to bear on the English Common Law which the colonists may be considered to have carried with them across the Atlantic. The charter had granted to the Assembly the right to make laws 'consonant to reason and as near as may be to the laws of England.' As more distinctively American conditions arose it was a question as to where the Common Law stopped and where the colonial law began. Confusion arose, and in 1711 the North Carolina Assembly was impelled to declare, not only that the Common Law was binding in the colony, but that all English statutes, especially those confirming inheritances and titles of land, should be enforced³. This was not sufficient. In 1749 the Assembly by law declared which of the statutes of England should be recognized in the colonial Courts⁴. So decidedly did the law swing away from its original mooring that in 1775 it was well out in

¹ Cf. Colonial Records of North Carolina, vol. ii, p. 723.

² The charter may be found in Col. Records of N. C. vol. i, p. 102.

³ Col. Recs. of N. C. vol. i, p. 789.

⁴ See the Revision of 1752.

the stream of a new development. It shall be our task to take up and explain the new features of the law relating to land as they came into existence in the colony.

Quit Rents. The most notable kind of landed estates in North Carolina, as in all the southern colonies, was the fee-simple estate held subject to quit rents¹. It was due to two facts: (1) the inability of the settlers to pay for their lands at once, and (2) the desire of the Proprietors to retain the rent as an acknowledgment of tenure between themselves and their tenants. The latter is shown by the later practice in the Proprietary Period of selling land outright while a very small quit rent was retained 'as an acknowledgment².'

The use of quit rents was retained throughout the Proprietary and Royal Periods, but it is doubtful if they were ever even fairly well collected. Yet in the Proprietary Period the amounts received from this source were considerable³. At two different times Thomas Lowndes alleged that the quit rents were sufficient to defray the ordinary expenses of the government⁴. Governor Burrington, however, does not corroborate this statement⁵. The long contest over the manner of paying quit rents, which was waged by the Assembly against Governors Burrington and Johnston, reduced the revenues from this source to a small sum. It was also difficult to collect them. The chief trouble was to get a correct rent roll. The basis of this roll ought to have been the records of the original grants and of the transfer of land between individuals. These records, however, were so carelessly kept that they could not be used for the purpose indicated. Several attempts were made to secure a general registration, but we have no evidence that any one of them was successful⁶.

Another source of trouble was the medium in which quit rents were paid. In early times the Assembly arranged a table of

¹ Mr. Justin Winsor falls into the error of saying: 'The efforts to colonize the seaboard region of North Carolina without giving the fee of the land to the people and without care in the selection of colonists, resulted in a failure even more complete than that of the Canadian colonists' (Narrative and Crit. Hist. vol. iv. p. xxii). If it were not true that lands held subject to quit rents are held in fee simple (cf. Williams, *On Real Property*, p. 124), it would still be necessary, in order to show the fallacy of this statement, only to remind the reader that lands were held in North Carolina in exactly the same manner as in Virginia and in South Carolina, and that these two colonies were eminently prosperous. We are of the opinion that poor harbours and a consequent lack of direct trade with Europe had far more to do with the slow growth of North Carolina than the prevalence of quit rents there.

² See Col. Recs. of N. C. i. pp. 383, 392, and ii. p. 58.

³ Ibid. ii. p. 169.

⁴ Ibid. iii. pp. 11, 49.

⁵ Ibid. iii. p. 149.

⁶ See *ibid.* ii. 34-5, and iii. 144. Also Revision of 1752, pp. 275-77, and *ibid.* p. 280. [N.B. We refer to the Colonial Codes as 'Revisions.' They occurred in 1751 & 2, 1765, and 1773. The laws of 1715 were a revision, but as they were never printed as such they appear in later Codes as original laws.]

valuation by which certain products, called on this account 'rated commodities,' were to pass as currency. In these, quit rents were paid¹. About 1715 the Assembly made these rents payable in colonial paper currency, then much depreciated². To this scheme the Proprietors objected so emphatically that we find no further mention of it until the royal regime. Burrington, the first royal Governor, acting under instructions, brought in a Bill requiring payment in proclamation money. The Assembly demanded that the provincial money should be received also. Each party remained obstinate and the Governor prorogued the Assembly³; but that body continuing its demand was alternately prorogued and adjourned until when Burrington was removed from office in 1734 it had passed no Bill on this subject.

The dispute was passed on to Johnston, the next Governor, who at first succeeded no better than his predecessor. After fourteen years of contention this Governor, by heroically suppressing some of the counties and their delegations, managed to pass a quit-rent law that was in conformity with his instructions⁴. Three years later Johnston died in office, and early in the term of his successor the quit-rent law was repealed⁵. A new law passed in 1752 seems never to have gone into operation⁶. In the meantime, the small amount of quit rents that was paid seems to have been paid in rated commodities⁷.

Closely connected with the above discussion was another about the place for receiving quit rents. In early times they were paid on the farms of the inhabitants, and although Tynte⁸, and perhaps other Governors, were directed to collect them at specific places, they continued to be paid as formerly. Burrington tried to make the same change but failed⁹. In 1735 Governor Johnston, after also failing to get such a Bill passed through the Assembly, settled the matter by proclamation, and thereafter the few who chose or were compelled to pay quit rents took them to certain designated places¹⁰.

The rate of quit rents varied. In the earliest grants it followed the Virginia custom, which was one shilling for each fifty acres. The Proprietors were inclined to put it at a higher figure, but the Assembly petitioned against this, and the Lords agreed in 1668 that henceforth the inhabitants of Albemarle should hold their land on the same conditions on which land was held in Virginia¹¹. This

¹ Col. Recs. of N. C. iv. 920, and iii. 144.

² Ibid. iii. 95.

³ Ibid. iii. 143.

⁴ Ibid. iv. p. xviii, and Revision of 1752.

⁵ Revision of 1773, p. 123.

⁶ Revision of 1773, p. 167.

⁷ Col. Recs. iv. 920.

⁸ Appointed Governor in 1708. Ibid. i. 694.

⁹ Ibid. iii. p. vi.

¹⁰ Ibid. iv. pp. xiv-xvi.

¹¹ Ibid. i. 175.

concession was known afterwards as 'the Great Deed of Grant,' and was most carefully preserved. Throughout the colonial period it was considered the fountain of landed rights. Although the Proprietors continually ignored it, the settlers always appealed to it, and in 1731 all the people claimed to hold under it¹.

Escheat and Forfeiture. By their grant the Proprietors had the incidents of escheat and forfeiture as well as the minor rights of wreckage, wastes, fisheries, &c. These are the only survivals of the older feudal incidents in the colonial laws.

Land was granted on condition that it should be properly 'seated' within three years². In 1722 it was held that this was done when the grantee had built a house on, and had cultivated one acre of, each tract granted. The Governor and Council decided whether or not this had been done, and the minutes of this body show that a large part of its business was hearing petitions to declare older grants forfeited and to issue new grants for the same.

Land escheated as under the Common Law on failure of heirs and for conviction of felony, treason, or *felo de se*³. We find but slight mention of the latter cause, most escheats being for failure of heirs, which was held to have occurred when there were no heirs in the province⁴. Like its English model, the County Palatine of Durham, North Carolina had an Escheator with various local deputies. His duty was restricted to deciding whether or not the deceased had heirs⁵. This he accomplished with the assistance of a jury of twelve men, whose verdict he communicated to the Council. Escheatable lands reverted immediately on the death of an intestate holder without heirs. This was important, because the person in actual possession at the moment of escheat might make composition for the land at twopence an acre⁶. The relatives of the deceased holder who were not heirs were given a preference in taking the escheated land on the payment of the composition money. The following was the order as established by the Assembly: the widow or the widower; the father; the mother; the eldest half-brother; the half-sister or half-sisters, each sharing alike; the nearest of kin; and finally the nearest person who should petition for it⁷. The composition money was all that was paid to secure the land, 'be the improvement more or less.' Heirs to land that had been escheated for seven years were debarred from suing to recover the same.

By the royal charter the Proprietors were granted the privileges

¹ Col. Recs. iii. 144.

² Cf. the Virginian grants, *ibid.* i. 59-67, and also *ibid.* iii. 148.

³ *Ibid.* i. 453.

⁴ *Ibid.* ii. 317, 323, 305.

⁵ *Ibid.* ii. 305.

⁶ *Ibid.* ii. 451, 452.

⁷ Laws of 1715, ch. 30; see Revision of 1752, pp. 11, 12.

of mines—for which they were to pay one-fifth of all gold and silver ore—together with the right to wrecks, fisheries, chases, &c. At first they reserved mines for themselves¹, but by 1712 they were granting them to individuals for a share of the minerals taken out². The privileges of hunting, fishing, and hawking they readily granted with the land. They also established wreckers whose duty it was to recover 'all wrecks, ambergrice, and other ejections of the sea'.³ This office is mentioned in the early correspondence only, and it is probable that it was soon abandoned.

Conditions of granting Land. In 1663 the land held by the whites in North Carolina was claimed either by purchase from the Indians⁴ or by grant from Virginia⁵. The Proprietors recognized the latter grants since they were settled according to the usual Virginia allotment, but because the former were large and irregular tracts it was thought that they ought to be reduced to the conditions of the regular allotments. After thus stating their opinions they left Sir William Berkeley, then Governor of Virginia and one of the Proprietors, to settle the matter as he saw fit⁶. We hear nothing directly from Berkeley, but we have evidence that in each case holders were compelled to take out new patents⁷.

The lands first taken were always those along the rivers, inso-much that it has been remarked that the early history of the colony was but the story of a 'search for bottom land.' The Proprietors tried to regulate this demand by saying how much of a grant should lie on a stream. In the Royal Period the King tried to secure a similar result, by directing that of a land grant the side lying on the river should not be more than a fourth of the side at right angles to it.

In 1665 the Proprietors made their first formal proposals to settlers. They offered to each free man who had already come into Albemarle County⁸ eighty acres of land for himself and, if married, eighty acres for his wife. A free woman who had arrived with a servant was to have a like amount. For each able-bodied man-servant, armed and victualled for six months, the master or mistress was to have eighty acres, and for each weaker servant, 'as women, children, and slaves' above fourteen years, forty acres. Every Christian servant was promised forty acres at the expiration of the period of servitude. Those who should arrive in the next three years were respectively to have sixty and thirty acres instead of eighty and forty. Those arriving in

¹ Col. Recs. i. 183, 237.

² Ibid. i. 19.

³ Ibid. i. 253, 270.

⁴ Ibid. i. 847.

⁵ Ibid. i. 17, and 59-67.

⁶ Ibid. i. 240.

⁷ Ibid. i. 53, 54.

⁸ Albemarle County lay in the north-east corner of the present State, and was the separate Government out of which the later colony grew.

the year 1668 were to have just half as much as those who had already settled there¹. These amounts were repeated with slight variation in the instructions to Governors until 1684 and perhaps still later, but it is possible that they were not put into practice. In 1694 it was the custom to grant fifty acres to each person brought in without regard to sex or condition. This was in imitation of the Virginia custom with which it was identical. At any rate, from 1694 'proving a right' meant in the colony taking up fifty acres of land for importing one person².

Abuses at times crept into the land office. One of these was allowing a man to prove a right for each time he had come into the country. One James Minge proved on one occasion six rights for himself and four for his negro Robin³. To remedy this evil the Council ordered in 1712 that thenceforth a man could prove but one importation for one person⁴. Another abuse was in surveying improperly. In 1729 Maurice Moore received a tract whose survey called for 1,000 acres. Twenty years later it was resurveyed and found to contain 3,834 acres⁵. Against this there was a law on the statute-books as early as 1715, and as late as 1752, which provided that if a man suspected his estate to contain more land than his survey specified he might have it resurveyed, and if the surplus were greater than one-tenth of the whole he should either forfeit the same or take out a patent for it⁶. This, however, was a rather lame remedy, inasmuch as it left the initiative to come from the holder⁷.

The right to receive land for importations could be proved either before the Council, the General Court, or the Precinct Courts. As the province became more extensively settled it was left almost entirely to the last-mentioned body. This condition, however, was reversed in the Royal Period, where we find it almost entirely in the hands of the Council, called for this purpose the Court of Claims.

A noticeable fact in the history of landholding in North Carolina was the usual smallness of the estates. Large estates would scatter the population and consequently would endanger the existence of a young colony. The people understood this, and one of their earliest laws—confirmed by the Proprietors in 1670—declared that no surveyor should lay out for one person more than 660 acres 'in one dividend,' unless the person had special permission from the Lords⁸. This law was to expire in five years, but its spirit continued. Early in the next century the Proprietors limited all

¹ Col. Recs. i. 81, 88.

² Ibid. iii. 424, 426.

³ Ibid. i. 635.

⁴ Ibid. i. 865.

⁵ Ibid. iv. 765, 1012.

⁶ Revision of 1752, p. 10 (Laws of 1715, ch. 29).

⁷ Col. Recs. iii. 184.

⁸ Ibid. i. 186.

ordinary sales to 640 acres in one tract¹, and the royal governors were instructed to the same end². Larger grants were occasionally met with, but these rarely held over three or four thousand acres. To this there is one exception. In 1737 Murray Crymble and others secured a grant of 1,200,000 acres on which they obligated to settle within ten years one white person for each one hundred acres. The enterprise was hardly a success. When it was finally closed up much more than half of the land lapsed to the Crown, and the remainder was left in the hands of small holders. The whole affair was a speculation and left no impression on the land system³.

When the King purchased Carolina one of the Proprietors did not sell his share of the land. In 1744 this share was laid off to him, and it fell in North Carolina⁴. The Proprietor was Lord Carteret, or Earl Granville as he had been created. He possessed his estates like any other private citizen. He continued to collect his fines, escheats, and forfeitures, as formerly, and to sell land for quit rents. When war broke out with Great Britain the State Government confiscated this property.

The Fundamental Constitutions and Land. We cannot pass to the more technical phase of our subject without speaking of the Fundamental Constitutions. As the Proprietors did not seriously attempt to put them into operation a few words will be sufficient here. In respect of personal freedom they were liberally conceived. In respect of landed property and the social organization depending on it, they were decidedly reactionary. They were ill-suited to the people for whom they were intended, and met with slight respect from those who originated them. While it is doubtless true that the Lords desired to put them into operation, it is also true that they never seriously attempted to do it. Along with the first copy that arrived in the colony came a set of rules which were to be followed until the more elaborate system could be made to work⁵. These rules constituted a temporary constitution, and under that the government was conducted. This is as near as the famous system ever came to a vital existence. The political development of the people was steadily away from it. Being intended for a full-grown cock it remained but an unhatched chick, with a few oscillations but never a sturdy stroke. It lingered in an uncertain state for about forty years, and then passed out of sight so quietly that the most painstaking research has not been able to determine when it ceased to breathe.

¹ Col. Recs. i. 706.

² Ibid. vii. 512, 543; also see Brickell, Nat. Hist. of N. C. p. 12.

³ See Col. Recs. iv. 253, vi. 718, 773, vii. 453, viii. 52, 63. 254.

⁴ Ibid. iv. 655.

⁵ Ibid. i. 181.

The Fundamental Constitutions¹ recognized six classes of landholders—Proprietors, Landgraves, Caciques, Lords of Manors, freemen, and leetmen. The first three classes constituted the hereditary nobility. The size of their estates was prescribed by law. Their lands were indivisible, inalienable, and descended according to the rules of primogeniture. These nobles could grant lands for not exceeding three lives or twenty-one years, provided they retained one-third of their property as demesne. Each of these three ranks were to constitute one of the four estates which made up the parliament. There were to be eight properties—one for each Proprietor—one Landgrave, and one Cacique in each County. The land of all these together was to be two-fifths of the County. Manors could be created within certain limits. They were alienable but not divisible. The Lord of the Manor could not grant a part of the manor for longer than three lives or twenty-one years. Each of these four classes had leetmen and could hold courts leet. The freemen held directly under the Proprietors as a body and were required—as well as all other landowners—to believe in a God, who was ‘publicly and solemnly to be worshipped.’ A leetman could not move off from his lord’s estate without that lord’s written permission. The rank was inherited or entered voluntarily. On the marriage of a leetman or a leetwoman the lord was to give the pair ten acres of land for their lives, and for this not more than one-eighth of the yearly produce could be taken as rent.

The Indians and Land. Sir Walter Raleigh’s first expedition to Roanoke Island carried to England a young Indian chief called Manteo. Him the next expedition brought back so full of Christian ideas that he was forthwith baptized and made ‘Lord of Roanoke.’ This incident illustrates the attitude of the white man towards the red man’s land. Everywhere the former claimed all the land and then assumed to allow the latter to hold a part of it as tenants. For a space the two parties lived side by side, usually as allies. Then there was war. The European won and was in a position to establish his claim.

This process is clearly seen in North Carolina. In 1691 the Proprietors declared that they had long since taken the Indians under their protection ‘as subjects to the monarchy of England².’ War came twenty years later, and immediately afterwards the Indians’ lands were surveyed, that is to say, the savages were restricted to what we should now call ‘reservations³.’ In order to

¹ They may be found in any collection of Locke’s writings; also in Col. Recs. i. 187.

² Col. Recs. i. 378.

³ Ibid. ii. 140, 316.

secure this land to the Indians a law was passed which forbade any white man without the consent of the Council to purchase any land that was claimed, or actually possessed, by an Indian ¹.

The estate of the Red Men in their land was merely one of possession. An Act of 1729 (chap. 2) stipulated that the transaction under consideration should not be construed to 'invest the fee simple of the said lands in the Indians.' If, however, an Indian held land individually this Act was not to apply to him ². In 1748 (ch. 3, 2nd section) an Act was passed to ascertain the bounds of the Tuscarora lands. These lands had been confirmed by treaty in 1713. They were now confirmed anew to the Tuscaroras, their heirs, and successors for ever, or as long as they should live on them. The Indians were not to pay quit rents, and no person for any consideration was to purchase any of the land. Those whites then living on it were required to leave at once, but persons who had received grants for parts of it might enter and enjoy the same as soon as the savages had moved off ³. When in 1766 (ch. 29) the Tuscaroras as a tribe sold these lands and left the province, the transfer was sanctioned by the Assembly. The mere consent of the Council does not seem to have been considered sufficient ⁴.

Alienation. The ordinary form of land transfer in North Carolina was the deed. Its popularity was perhaps as much due to the fact that it was employed by the Proprietors in granting land to settlers as to its superior convenience. It seems to have supplanted all other forms, except perhaps lease and release. Certain it is that fines and recoveries were not in use in North Carolina ⁵.

The absence of fines and recoveries caused inconvenience in reference to two kinds of transfers: (1) conveyances by *femes covert*s, and (2) the barring of entails. In regard to the former it was the early custom for the husband to convey with the wife's consent or for both to convey jointly, acknowledging the conveyance in Court after the wife was privately examined. By Act of 1715 (ch. 28) the latter was made the proper method, but the law was declared not to apply to entails. A difficulty arose from the inconvenience of getting the consent in Court of a *feme* who was either seriously sick or out of the province. In 1751 this was remedied by requiring in such cases, in addition to the husband's acknowledgment, a commission from the clerk to some third party who was to examine the wife as to her consent and report under oath to the Court ⁶.

¹ Revision of 1752, p. 39 (Laws of 1715, ch. 59).

² Ibid. p. 247.

³ Revision of 1752, p. 9. Laws of 1715, ch. 28.

⁴ Ibid. p. 72.

⁵ Revision of 1773, p. 369.

⁶ Ibid. p. 337.

In the early period entails were barred by private Acts of the Assembly. The expense of this prevented ordinarily the alienation of small estates tail. In 1749 (ch. 4, 2nd section) the Assembly enacted that entailed estates of less than fifty pounds value should thenceforth be alienated by a deed of bargain and sale for a valuable consideration actually delivered. Such a conveyance was to pass the fee and to bar the entail, remainder, and reversion. To determine the value of such an estate the Secretary of the province was to issue a writ *ad quod damnum* under which the Sheriff was to appoint a number of 'good and lawful men' to value the land in question and to report on the same. Such a deed of bargain and sale must be acknowledged in Court and duly registered¹. The more valuable entailed estates continued to be barred, as formerly, by means of private bills.

Alienation by inheritance followed the general English practice, which was primogeniture. This view is supported by two facts. (1) There is not on the statute-book any law which interferes with primogeniture. We would therefore expect the English practice to prevail. (2) We find in various records several references to the 'heir-at-law' in a way which indicates that one of the heirs² of an intestate ancestor had landed rights superior to those of the other heirs³. The Act cited in note 3 indicates that primogeniture was stronger in the colony as a custom than as a right. Its importance was greatly lessened by the free alienation by wills and by the ready sale of land for debt. As for wills, they were made under the statutes 32 & 34 & 35 Henry VIII. Social and economic reasons made it difficult for an estate to pay off the debts of its owner, and consequently it was thought best to sell it. By an early law the lands of persons who had left the colony were held for debt⁴. This was repealed in 1746. An English statute (5 Geo. II), called 'An Act for the more Easy Recovery of Debts in His Majesty's Plantations,' replaced these laws. In 1764 North

¹ Revision of 1752, p. 291.

² It will be remembered that the American use of the word 'heir' is much wider than the English use of it.

³ An Act in 1766 (ch. 5)—which is not the first time this Act appears in the Laws—directed the administrator of an estate to give the widow one-third and to distribute the remainder among the children. If any child 'not being the heir-at-law' had received property from the intestate by settlement or otherwise, it was to be counted in his share of the distributed property. 'But the heir-at-law, notwithstanding any land that he shall have by descent, or otherwise, from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent or otherwise from the intestate.' In this Act the term 'heir-at-law' is used three times: see Revision of 1773, p. 343; also Revision of 1765, p. 281. We also note that in 1729 Governor Burrington complained that certain executors in trust had detained 'the residuum from the heir-at-law,' after paying legacies. Cf. Col. Recs. iii. 28.

⁴ Laws of 1715, ch. 18; also Col. Recs. iii. 182.

Carolina made a law supplementary to the British Act, but it was disallowed by the King¹.

Registration. From the beginning land deeds were required to be registered. In 1665, twelve years before the Statute of Frauds, the Proprietors established the office of Registrar. His duty was to record grants from the Lords as well as 'all conveyances of land howse or howses from man to man, as also leases for land howse or howses made or to be made by the landlord to any tenant for more than one year².' The first deed registered was the valid one. At first a deed must be proved by two witnesses before the Governor or 'some Chief Judge of a Court.' Gradually the function was taken away from the Governor, and by 1715 it was centered in the local, or Precinct, Courts, where it remained ever afterwards. This law of 1715 (ch. 38) provided that all land deeds, except mortgages, must be registered within twelve months or they would not convey a valid title. Deeds thus executed passed 'estates in land, or rights to other estates, without livery of seizin, attornment, or other ceremony in the Law whatsoever.' The first deed registered was the valid one, but if a first mortgage should be registered within fifty days a second one previously registered should not invalidate it. The giver of a second mortgage, the first remaining in force, was to lose his equity of redemption. Finally, a mortgage should not bar a widow of her right of dower³.

This law did not entirely accomplish its object. In 1741 many persons through either ignorance or neglect had failed to register their deed within the proper time. These were relieved by having their time extended one year. In 1756 the same class of delinquents had the time extended two years, and this same law was after that re-enacted five times before 1773.

An interesting fact in this connexion is the attempt to introduce the custom of 'processioning lands.' In 1723 (ch. 4) an Act was passed providing that 'the lands of every person in this government shall be processioned and the marks renewed once in every three years.' Two freeholders appointed for the purpose, and such others as would go along, were to go over the bounds of the land, finding and renewing the marks. These two men made report of their action to the Precinct Court, where the report was preserved by the clerk. Persons whose lands were twice 'processioned' were to be considered sole owners and might plead this Act to that end; provided, however, that this law should not defeat the rights of reversion and remainder, or the titles of orphans, femes coverts, lunatics, &c. These persons were to have liberty to sue for their

¹ Revision of 1765, p. 358, and Revision of 1773, p. 328.

² Col. Recs. i. 79.

³ Revision of 1752, p. 20.

rights within three years after the removal of disabilities¹. The law for processions remained on the statute-book in 1773, but it is likely that it was but poorly enforced.

Occupation. In the laws of 1715 (ch. 27) it was provided that all persons who held titles through sales made by creditors, by husbands and wives jointly, by husbands in right of their wives, or by endorsement of patents, and who without suit in law should continue in possession for seven years, these persons should have the legal title. Moreover, persons claiming lands, tenements, and hereditaments must present their claims within seven years after the rights descended or accrued, or be debarred from suing afterwards. Orphans, *femes coverts*, and infants were allowed three years in which to make claim after the disabilities were removed². This law may possibly be very old law, for, as has been said, the laws of 1715 were mostly revisions. Perhaps it is not too much to connect it with a provision of the Proprietors in 1665 which declared that all who quietly enjoyed their land for seven years should not be required to resurvey them for any consideration whatsoever.

The above law deals with occupation where there is 'colour of title.' As to occupation 'without colour of title,' we find no mention of it in the early history of the colony. It is as late as 1755 (ch. 5) that we find a law allowing a good title to those who could prove undisturbed possession for twenty years. Here also infants and *femes coverts* could sue within three years after removal of disabilities³. This law was on the statute-book of 1765, but in that of 1773 it was indicated as 'repealed by proclamation.' It embodies the only legislation on the subject that is to be found in the colonial laws.

JOHN SPENCER BASSETT.

¹ Revision of 1752, p. 54.

² Revision of 1773, p. 4.

³ Revision of 1765, p. 270.

FRENCH COURTS AND FOREIGN PARTIES.

IN the Law Journal for November 3, 1894, p. 628, in an article on 'British litigants in French Courts,' the following passage occurs:—

'It is not generally known in England that French Courts hold themselves entitled, as a matter of strict right, to refuse to adjudicate between foreigners in the absence of treaty stipulation conferring on foreigners rights of access to French Courts. But as other foreign nations, such as Portugal and Italy, have treaty rights of access, it is chiefly in regard to British litigants that the question is important.'

Further on, the article states that the French Courts declare themselves incompetent to decide disputes between foreigners, 'except where the defendant is domiciled in France, or the process relates to property in France, or to obligations contracted in France,' and that it is in commercial and maritime cases that the hardship is chiefly felt.

As this article was copied bodily in the Globe of November 5, where it was probably widely read, and as the subject is no doubt one of importance to Englishmen, it is perhaps worth while to notice some of the inaccuracies contained in the above exposition of the French law.

In the first place, it is quite true that many countries have treaty rights of access with France, notably Switzerland, but neither Italy nor Portugal is among the number. With regard to Italy, probably allusion is here made to art. 22, § 4, of the treaty of March 24, 1760, with Sardinia, when that kingdom became the kingdom of Italy, ratified on September 11, 1860, which provides that 'in order to be admitted to access before the tribunals, the subjects of both nations shall only be bound by the same formalities as those binding natives according to the practice of each tribunal;' but this clause has no effect with regard to the jurisdiction of the Courts. A decision of the Tribunal of the Seine reported in the Journal de droit international privé, 1879, p. 543, declared that 'Il n'existe aucun traité entre la France et l'Italie reconnaissant aux sujets italiens devant les tribunaux français la même situation qu'aux Français eux-mêmes en ce qui

concerne leurs réclamations contre les étrangers.' And this decision is quoted in Vincent and Pénaud's *Dictionnaire de droit international privé*, 1888, p. 280¹, and is still good law.

As to Portugal, it is true that the Commercial Treaty between that country and France of December 19, 1881, confers upon the subjects of either nation equal rights in matters relating to commerce and industry. But here again this provision effects no change in the French law relating to jurisdiction in disputes between Portuguese subjects in France. (See '*Tribunal Seine*,' May 10, 1883.)

To pass, however, to what is more important to English readers, viz. the real situation of foreigners, and more particularly of British subjects, with respect to the French Courts, the propositions laid down in the articles above referred to are incomplete and misleading.

To give jurisdiction to the French Courts in a dispute between foreigners, it is not sufficient that the defendant should be domiciled in France, that is, if the expression 'domiciled' be taken in the English sense of principally resident. He must also have received the authorization of the French Government to establish his residence in France, for only in this manner can a foreigner acquire a legal domicile in France in the eyes of the French law. If the plaintiff cannot show this, then he will be defeated, unless he can further prove that though the defendant has not been authorized to establish his domicile in France, yet he has acquired a *de facto* domicile, and has abandoned any previous home or establishment in his native country, to the Courts of which the plaintiff could apply for relief. If this be shown the French Courts will retain the cause, for otherwise there would be a denial of justice².

Nor is it enough, as stated in the *Law Journal*, that 'the process should relate to property in France, or to obligations contracted in France.' The property must be immoveables; a dispute as to personal property in France would be insufficient to give

¹ The Franco-Italian Commercial Treaty of 1881 deals solely with questions of tariff and similar matters, and has no relation to the jurisdiction of the Courts. Indeed, in a recent case before the Tribunal of Nice (June 21, 1892), where an Italian wife brought an action for a legal separation against her husband of the same nationality, domiciled in France, the husband set up the plea of want of jurisdiction, both parties being foreigners, and was only defeated by reason of the qualifying rule referred to below, that where a defendant is permanently resident in France he must show, in order to escape the jurisdiction, that he has a bona fide domicile abroad, and that relief can be sought there. The treaty with Sardinia relates to reciprocity in the execution of judgments.

² Aubry et Rau, i. p. 577, and viii. p. 146; Demangeat sur Fœlix, i. p. 317; Paris, December 5, 1890, and May 18, 1892 (S. 1892, ii. 233); Paris, June 28, 1893; Seine, July 10, 1893 (*La Loi* of July 22, 1893). See also articles in the *Journal de droit international privé*, 1880, p. 475; 1886, p. 192, and p. 86 (notes).

jurisdiction to the French Courts, inasmuch as 'mobilia sequuntur personam,' and are not legally situate in France, when they belong to foreigners, except where moveables are treated *en masse*, as in cases of succession, when the testator was *de facto* domiciled in France. So with regard to 'obligations contracted in France.' This circumstance alone and *per se* is of no avail¹.

It is true that in commercial matters where the contract has been made in France and the goods delivered there, the French Courts have jurisdiction because an article of the Code of Procedure² expressly says so. The same article provides that there is jurisdiction if payment was intended to be made in France. But this article only applies in what are strictly commercial and maritime cases, so that so far from its being the case that the hardship of the French system is chiefly apparent in commercial and maritime cases, the fact is, on the contrary, that in this class of cases there is usually a loophole of escape, and it is in purely civil disputes, such as actions for recovery of debts, disputes between husband and wife, and matters relating to status that the rule presses with the greatest severity. But even with regard to these last matters, the stringency of the Courts of France has gradually very much relaxed. The French judges will always grant temporary relief in urgent cases, such as authorizing a wife to leave her home when it would be dangerous for her to remain there, taking measures for the protection of foreign infants abandoned or ill-treated by their parents, protecting the property of a foreign lunatic or absent person, &c.³

They will even entertain actions for divorce or legal separation between foreigners, where the party setting up the want of jurisdiction is unable to show to the satisfaction of the Court that he has a bona fide domicile abroad, and that the other party can apply for relief to the Courts of that domicile⁴. This of course was only an extension to questions of status of the ordinary rule before referred to, but nevertheless it was a distinct advance upon that doctrine, because for a long time all matters relating to the

¹ 'Le lieu où a pris naissance l'obligation qui sert de base à l'action pas plus que celui de l'exécution ne doit pas en principe influer sur la question de compétence.'—Rennes, April 23, 1855. 'La circonstance que le contrat a été passé en France ne saurait suffire par elle-même à entraîner la compétence du juge français.'—Casa. January 29, 1806.

² Art. 420, Code of Civil Procedure:—

'Le demandeur pourra assigner à son choix

Devant le tribunal du domicile du défendeur ;

Devant celui dans l'arrondissement duquel la promesse a été faite et la marchandise livrée ;

Devant celui dans l'arrondissement duquel le paiement devait être effectué.'

³ Metz, July 26, 1863 ; Sir. 64. 2. 237 ; Trib. Seine, May 2, 1891.

⁴ Nice, June 21, 1892 ; Paris, May 12, 1892.

status of foreigners were severely left alone by the French Courts, who themselves, as is well known, insist most emphatically upon the application of the French law of status to all Frenchmen wherever resident (art. 3 of the Civil Code).

Even in *ex parte* matters where there is no question of a dispute between persons actually resident in France, and where the injured party would be unable to obtain redress elsewhere, the French Courts have sometimes interfered. In a recent case they appointed a guardian to a foreign minor, a Greek, where the Greek consul had declined or neglected to take any steps in the matter¹.

Indeed, in a recent case they have so far departed from their usual rule not to interfere in such matters, as to appoint a 'conseil judiciaire'—that is, a person whose duty it is to control the finances of a spendthrift (prodigue), and without whose authority the spendthrift is unable to dispose of his property, borrow money, or give receipts for payments, &c. to a British subject, although the institution of such financial guardians is wholly unknown to the English law². It is true that in that case the British subject was born in France, and had lived there all his life, having no home or relations in England, and that by English law, as pointed out in the judgment, such matters are governed by the law of the domicile.

Still the case goes rather further, in the application of the principal exception to the general rule, than any which had been previously decided, so far as the present writer is aware.

Finally, there are one or two other exceptions to the general rule, as in actions of a quasi-penal nature—as observed in the article which was the text of these remarks, where the cause of action arises from a delict or quasi-delict, and actions founded upon matters of public policy, or relating to acts of sovereignty.

However, in spite of the numerous exceptions and modifications gradually grafted by the decisions of the Courts upon the original rule, there can be little doubt that this rule is often productive of great inconvenience and injustice to foreigners. And considering the large number of nations having treaty rights of access to the French tribunals, including such countries as Guatemala, Honduras, Nicaragua, Paraguay, San Domingo, and the Sandwich Islands, it is somewhat remarkable that in these days of international conventions upon almost every conceivable subject it has not hitherto been thought worth while to secure a similar arrangement for the benefit of British subjects. Possibly, however, there are diplomatic difficulties in the way, which mere lawyers cannot be

¹ Seine, April 19, 1894.

² Seine, April 6, 1894.

expected to understand. In any case, there can be little doubt that there are many international vexed questions still pending, where the need for reform is more urgently felt, and to which accordingly the efforts of diplomatists and governments have to be directed, to the exclusion of less pressing matters.

MALCOLM M^CILWRAITH.

MAINTENANCE AND EDUCATION.

A NOTE IN REPLY.

1. **I** HAVE read with interest the result of Mr. Bewes' investigation of the record in *Knapp v. Noyes*, an investigation which circumstances rendered it impossible for me to make. Incidentally, by reciting the 'maintenance and education' clause at length, he shows that I was right in my inference, drawn from the judgment, in spite of the head-note, as to the form of the clause, and the absence of any express reference to minority therein. With all deference to my critic, and with a sense of obligation to him for the light which he has brought to bear upon the case, I am still unable to see any indication that Lord Camden was adverting, in the last two paragraphs of his judgment, to anything but the text of the clause in question, and relying on anything but the force of the words 'maintenance and education' therein contained. That he might have arrived at the same result by another process seems to me not relevant, and I therefore abstain from offering any opinion as to the soundness of the arguments which Mr. Bewes thinks the L.C. might have used, but of the use of which the judgment, as reported, shows no sign. As to how far the reasoning of the judgment generally is to be relied on, and as to the merits of the report, I do not propose to add anything to what I said, but I cannot, without evidence, take it for granted that the judgment delivered was only partially reported, and that the part unreported would, if forthcoming, vary the meaning of the text as we have it. I observe that my critic concedes that 'the report in Ambler must be taken as accurate as far as it goes'; but his assumption of its incompleteness does not seem justified by internal evidence, which is apparently the only kind of evidence existing.

2. I have no quarrel with the saying that 'one man's nonsense should not be interpreted by another man's nonsense.' 'The House of Lords has laid down in *Jenkins v. Hughes* and other cases, that, on a question of construction, one Court is not bound by the construction put upon a similar instrument by another Court, unless some principle of construction is laid down, even though the words may be identically the same,' per Jessel M.R., in *Emmins v. Bradford*, 13 Ch. D. at p. 496. This rule has never, so far as I know,

prevented a judge from saying, when he finds in the document before him a word or phrase of common use and frequent appearance in documents of a like kind, that that word or phrase has naturally, or by force of previous decisions, or both, a *prima facie* meaning which it will retain unless modified by the context. This is all I conceive Lord Camden and Wood V.-C. to have done, and I ventured to hint that Lord Camden did not allow sufficient weight to the context in *Knapp v. Noyes*. As before, so now, I abstain from speaking of 'technical words' in the strict sense—for the rationale of interpreting them, *Roddy v. Fitzgerald*, 6 H. L. C. 823, is an authority.

3. Mr. Bewes' remarks on *Gardner v. Barber*, as well as on *Knapp v. Noyes*, seem to me, if I may say so, to exhibit a method of reading cases which is open to some objection. It does not seem to me legitimate to say that the grounds of principle and authority which a judge has adopted as the basis of his decision may be treated as *obiter dicta* because the particular result at which he arrived might have been reached by another method, or justified by different reasoning, or because the report of the judgment is conceivably incomplete. Of the 'special reasons' which Mr. Bewes gives, one, (a), is incidentally noticed by Wood V.-C. near the end of his judgment as confirming the view to which authority and his own view of the *prima facie* sense of words had led him—another, (c), is based on a circumstance which I pointed out (p. 335 n.), as having seemingly escaped attention—the third, (b), based on the words 'and so in proportion for any less term than a year,' seems also to have passed unnoticed. As a 'broken year' might as readily occur in the case of a life interest as in that of a minority allowance, the argument is of doubtful value.

4. Of the cases which Mr. Bewes mentions as omitted by me and as being 'important cases against my main contention,' *Alexander v. M'Culloch*, 1 Cox 391, did not escape my attention. I did not refer to it because I was of opinion that in a discussion of the extent of allowances for 'maintenance and education' it was not necessary to cite the case of a will in which neither of those words occurred. With all deference to my critic, my opinion on this point remains as before. *Kilvington v. Gray*, 10 Sim. 29, which I incidentally referred to (p. 335 n.), did not strike me as important, because the context of the word 'maintenance' (not 'maintenance and education') seemed to point clearly to something more than a mere minority provision being intended. It is to be observed that the argument does not seem to have turned on the question 'minority or life,' but on the question 'jurisdiction of Court or discretion of trustees.'

5. I do not dispute that the word 'annuity' has acquired a *prima facie* sense of 'yearly allowance for life.' It is conceivable that a judge who agreed with Lord Camden and Wood V.-C., and deemed himself bound by their authority, as to the *prima facie* meaning of a provision expressed to be made for maintenance and education, might, if he had to construe words like 'an annuity of £ to £ for his maintenance and education,' feel called upon to decide that the *prima facie* meaning of 'annuity' was to prevail. I have not suggested that words of purpose are to be looked at to supply a time-limit of enjoyment, save in the absence of other words from which a time-limit may fairly be extracted. In such a case, I do not think that the circumstance of the beneficiary not being in need of the provision is relevant. The important matter is the intention of the settlor or testator, who has, *ex hypothesi*, omitted to indicate a time-limit, except so far as one may be gathered from his words of purpose.

6. I should like to make a slight alteration in one paragraph of my article, and to add a foot-note, which, by an oversight, I failed to send up in time. The last sentence of my sketch of the judgment in *Wilkins v. Jodrell* (p. 338), should run: 'He also referred to a class of authorities not really, it is submitted, relevant, as in them the association of an adult with infants in the enjoyment of a provision expressed to be for maintenance, or the engrafting upon a life interest, by words expressive of the testator's purpose in giving the life interest, and strong and precise enough to found a trust, of provisions for the maintenance or maintenance and education of the life-tenant's children¹, would seem to rebut any presumption which might be drawn *prima facie* from the words, that the infants' interest was to cease at majority.'

T. K. NUTTALL.

¹ For the last case of this class, see *Re Booth*, '94, 2 Ch. 282 (North J.). It seems that in cases of this class a considerable discretion is left to the life-tenant. A child may lose its right by marriage (*Bowden v. Laing*), but not necessarily (*Re Booth*), and the right may revive, e.g. on widowhood in the case of a daughter (*Scott v. Key*, 35 Beav. 291)—it may be affected by the fact of advancement out of the *corpus*, or by the general circumstances of the child (*Re Booth*). For a caustic comment on the 'cruel kindness' of the Court in erecting trusts upon such expressions of purpose in cases of this kind, see the judgment of James L.J. in *Lambe v. Eames*, L. R. 6 Ch. 599.

A SPANISH APOSTLE OF BENTHAMISM.

WHEN, in 1811, the Liberals of Spain, by drafting the famous Constitution of Cadiz, laid the foundation of all the modern political life of their country, forty years had elapsed since Jeremy Bentham published his first book. Those forty years had now given him celebrity; and his celebrity was still greater on the Continent than in his own island. For in England, during his own lifetime, Bentham's reputation and his practical influence upon legislation were due mainly to his writings upon topics of mere current interest. But there were greater works, whose publication gave him immediately a fame on the Continent, and laid the permanent basis of that which he now enjoys at home. The 'Theory of Legislation,' the 'Theory of Punishments and Rewards,' the 'Political Tactics,' and 'Judicial Evidence,' have been translated into almost every language, even into that of Bentham's own countrymen; and have done more than the works of any other single writer to ameliorate the legislation of the civilized world.

But in these and similar permanent treatises, though the thought and materials were Bentham's, the style and shape were usually due to the pen of some subordinate expositor. Bentham happily had in Dumont, Stuart Mill, and Bowring, not only enthusiastic disciples, but also painstaking editors possessed of a popular style. The only book of fundamental scope due to Bentham's own hand was the 'Introduction to the Principles and Morals of Legislation'; and this, after its first publication in 1789, was not reprinted till thirty-four years later, and has never been translated into any foreign language. The expositions of the disciples were more attractive than those of the master himself. Bentham loved the difficult task of original discovery, the patient analysis of ideas, the laborious deduction of consequences; but from the elaboration of literary form, and the technical craft of arresting popular attention, he turned impatiently away. Even when a treatise had already been carried very far, if some novel and perhaps dissonant idea occurred to him, he would put down the pen and undertake a minute study of the newcomer; so that his pigeon-holes came at last to be stuffed with a multiplicity of unfinished manuscripts, kindred in their subjects, yet differing in their titles and in their points of view. During most of his life he spent his time in

assiduous study, often carrying on several works simultaneously. Hence at his death many of his intended books still remained utterly inchoate; and his long-planned comprehensive view of his system had not yet been seriously commenced. If a manuscript of Bentham's had to go straight to the press, he could write with a vigour and directness that bordered upon gaiety. But when, as usually happened, he had indefinite time for labouring on his work, he elaborated it with such masses of detail and digression as, if printed, would dishearten any ordinary reader. The logical rigour on which he prided himself made his labours so vast that when death surprised him in the midst of his unremitted toil, at the age of eighty-four, after sixty-two years of unceasing labour, he had not finished the business of preparation, and had scarcely commenced that of exposition. Little of general range was finished; there was simply an immense mass of incomplete attempts and of mere monographs, which now fill eighty wooden boxes and various portfolios in the library of University College, London—not, as Señor Silvela by an almost pathetic error supposes, in the University College of Bentham's own Alma Mater on the Isis. Hence arose the importance of the services of disciples who could retrench, supplement, and popularize; so as to give to the world a book which embodied Bentham's ideas, and which nevertheless was readable. How much Dumont, Stuart Mill, Grote, Bowring, and Francis Place did in this direction everybody knows. But Señor Silvela presents us with an interesting sketch of another such disciple and apostle, a Spanish Utilitarian, whose attempts to give a popular exposition of Benthamism are scarcely known even by name to Englishmen, though they appear to have been regarded with exceptional favour by the master himself. Bentham seems readily to have supplied all his expositors with manuscript material; but, perhaps from the expectation of ultimately superseding all their efforts by some comprehensive treatise of his own, he appears never to have been willing to share the labours, the responsibility, or the honour, of their task of exposition. Though he owed to Dumont the whole of his Continental and much of his English reputation, he never gave his formal approval to Dumont's books. Even so late as 1811, when issuing the 'Theory of Punishments and Rewards,' Dumont still had to say that Bentham, though continuing to trust him with his manuscripts, 'wishes to be in no way responsible for the books'; and in 1827 Bentham went so far as to growl out in conversation that 'Dumont does not understand a word of my meaning.' Yet the recognition denied to Dumont and Mill seems to have been conceded to this Spanish exponent, Toribio Nuñez.

This writer, according to Señor Silvela's account, 'realized in great measure the aim to which Bentham had in vain directed his own life—the final achievement of expounding the fundamental principles of all branches of legislation. And he did this in a volume which Bentham himself sanctioned with the exceptional honour of his own express approval; and which is consequently, however it may have fallen into undeserved oblivion, the most authoritative of all the manuals of Benthamic jurisprudence.' Other Spaniards had already undertaken translations from Bentham's writings. 'Of all English writers,' says Blaquiere in 1822, 'Bentham ought to be the most satisfied with his reputation in Spain.' For, between 1820 and 1845, 'no other foreign author,' says Señor Silvela, 'exercised in Spain so great an authority as Bentham.' His book on Prisons was translated as early as 1819; and translations of other works of his continued to appear in long series, including a translation of his collected writings in fourteen volumes. But the writings of Nuñez stand above all these; for they were far more than mere translations.

Señor Silvela, in his patriotic anxiety to revive the memory of the Spanish disciple who was thus highly favoured by the great English jurist, has searched the archives of the University of Salamanca and has sought out the surviving members of the Nuñez family. A granddaughter, Doña Javiera Nuñez, entrusted him with two autograph letters from Bentham to Nuñez; and also with one of Nuñez' replies, which had been thought so important by Bentham's literary executor that extracts from it may be found printed in his collected edition of Bentham's works.

Nuñez himself was born in 1776; and entered the University of Salamanca in 1790. Here a Spanish translation of 'Télémaque' fell into his hands, and inspired him with a wish to learn French. This tale, by a curious coincidence, was the very book that had kindled the enthusiasm of Bentham himself, at the mature age of seven, and became 'the foundation stone of my whole character, the starting-point of my career in life; to it the first dawning in my mind of the principle of Utility may be traced' (Works, x. 10). It may perhaps have similarly turned Nuñez' mind towards sociological problems, or even have suggested to him the Utilitarian clue to their solution; if not, it at least led him to learn the language in which he found books that did all this. Having devoted himself to the study of Canon Law and Jurisprudence, Nuñez obtained his doctorate in 1792; and subsequently undertook various academical offices. But, failing in his candidature for a Professorship, he quitted the University and devoted himself to business pursuits; still prosecuting his studies until he had amassed the means of retiring

into learned leisure. In 1807, the march of the French army through Spain on its way to Portugal accidentally gave him an opportunity of purchasing from one of its hucksters a copy of Dumont's 'Theory of Legislation.' A perusal of this book produced an indelible impression on his mind. Thenceforward he was a devoted disciple of Bentham.

In 1812 he was recalled to Salamanca as University Librarian; and in the following year he gave full proof of his familiarity with Bentham's works in his 'Account of the University of Salamanca, its plan of studies, its foundation and history, and the reforms of which it is susceptible; with a proposal for a law on public education.' This was drafted as a preface for a Report that the University had to make in answer to a general summons issued by the Cortes, which thus early in the first epoch of Spanish Constitutionalism had begun to show an active interest in national education. The University Council long debated whether or not Nuñez' dissertation should be allowed to get into print for general circulation, fearing that the public would take alarm at its excessive Liberalism. It was urged, for instance, that the portion bearing on moral training could not safely be issued to the world at large without the addition of a sprinkling of Biblical texts that would reiterate its ethical rules, 'and so make them more religious.' As a matter of fact, the dissertation did not get into the press until seven years later, and the University did not then find it necessary to add the Scriptural seasoning; times had changed between the first Constitutional period and the second, and it was no longer indispensable to make morality more religious.

This dissertation begins with phrases which are obviously borrowed from Bentham's own 'Principles of Morals and Legislation.' Utility as the basis of social science, public happiness as the great object of legislation, and the physical, moral, religious, and political sanctions as the determinants of human action, are the key-notes of Nuñez' philosophy. And his remark that they all are so obvious that any attempt to prove them would be an insult to the Cortes and the Spanish nation is a characteristic saying that bears the very hall-mark of genuine Benthamite enthusiasm. None the less, Nuñez' plan for national education hyper-Liberal as it seemed, was far from recognizing our modern freedom of teaching, a right of which no one then dreamed. He proposed that every branch of instruction throughout Spain should be rigidly controlled by the State; the first duty of Government being to establish a body of political, moral and religious doctrine which should secure respect for the King, the Constitution and the Church, and should be embodied in an entire series of educational literature, beginning

with the primer and working up to the University text-book. That any one who had not obtained official recognition should take upon himself to give instruction, would be an offence so opposed to the greatest happiness of the greatest number that it was to be rendered penal. Finally, by a provision so quaintly at variance with the realities of life that nothing but the engaging enthusiasm of dawning Liberalism can account for it, all the parochial clergy were to be charged with the duty of defending and propagating this official body of social doctrine which set the seal of State and Church upon the current theories of Spanish Liberalism, and especially upon the new-born but sacred Constitution of 1812. The scheme, of course, never became law; for the counter-revolution in the spring of 1814 placed Ferdinand again upon an absolute throne, and its approach must already have been terribly obvious to the Doctors of Salamanca when drafting their Report. Six years later, however, when in March, 1820, the insurrection at Cadiz ushered in a second period of Constitutionalism, this Report was revived and published by the University.

But the intervening years of absolutism, from 1814 to 1820, had been a time of suffering for Toribio Nuñez. In 1816 the University of Salamanca had been purged by a Royal Commission, which dismissed Nuñez from his librarianship without even a pension. He retired to Piedrahita; the town where the granddaughter who possesses his papers still resides. But in 1820 he was recalled to his librarianship. He immediately availed himself of the freer times by publishing a book. It was entitled 'The Spirit of Bentham: a system of Social Science on the plan of the English jurist, Jeremy Bentham, carried out according to his principles by Dr. Toribio Nuñez, a Spanish jurist.' This little volume of one hundred and forty pages is, as Bentham himself described it, 'a sort of analytical view' of Utilitarian principles. Señor Silvela says truly that it is 'written with admirable clearness of diction and arrangement, and with an enthusiasm of conviction which fascinates the reader'; and he adds, 'I can say without fear of contradiction that it is the best existing exposition of Benthamism.'

It was only intended as preliminary to a Spanish translation, or rather codification, of Bentham's entire works, which Nuñez was contemplating; and for which he invited subscriptions. He assures his subscribers that Bentham must be still alive, 'for his French editor says so,' and a Spanish correspondent of his, Señor de Mora, 'has given me authentic proofs of it.' Accordingly he urges all lovers of knowledge 'to implore Bentham to confer upon mankind the greatest favour that he can, by either correcting the rough sketch which I have given of his system, or else by arranging for

the literal publication of his own original manuscripts.' For Nuñez very frankly declares that though Dumont deserved the credit of having made Benthamism known, he could not be complimented upon being either profound or precise. Nuñez proposed to organize from Bentham's materials 'a complete system of social science' in three volumes, treating respectively of the 'Principles,' the 'Theories,' and the 'Arts' of that science. The first was to be an expanded version of this Preliminary Discourse, and to embody 'the arithmetic, logic, anatomy, physiology, pathology, and nosology' of the subject; the second, its 'pharmacology and clinical pharmacopoeia'; and the third, its 'hygiene and dynamics.'

A copy of the Preliminary Discourse was naturally sent to Bentham. His letter of acknowledgment, which has been preserved by Nuñez' granddaughter, is of the most cordial character. 'Worthy and eminently well-beloved disciple,' writes the master, 'thy mind is the very child of mine, thy talent of my talent, thy enthusiasm of that enthusiasm which, kindled four and sixty years ago, is not altogether quenched by age.' How little, indeed, age had withered him he proceeds vividly to portray. 'It is, I see, a matter of uncertainty to thee whether I am alive. Yes, I not only am still living, but, though seventy-three years of age and as fully prepared for dying at any time as it is possible for man to be, I feel so little defalcation from the small allotment of bodily force my parents gave me that I see nothing as yet to prevent my living some years longer. And as to gaiety, I possess more than I ever did at any former period: not less than the boys who write for me and laugh with me and at me; and full as much as any of the few adult friends whom I can afford time to see—a state of mind for which I am indebted to the occupation given to the greater part of my time, and to observation of the fruits which by degrees are flowing from it.' Noticing Nuñez' desire of becoming acquainted with his original manuscripts, unpolished by Dumont, he goes on to say that, 'in knowing only such works of mine as have found a French elaborator and editor in Dumont, scarcely dost thou know half of me. Of all my works, published and unpublished, I am getting together a collection and shall employ my endeavours in getting it forwarded to thee.' In a postscript, Bentham gives a bitter picture of the English Universities. 'From Salamanca such a book as thine! From Coimbra marks of Liberalism altogether correspondent! In the University of Coimbra was Dumont's edition of my works, almost as soon as edited, an object of attention. What Salamanca and Coimbra were before that time, Oxford and Cambridge are still. Oxford, in which the whole force of that wretched substitute for a mind which has been in possession of the rulers has

been engrossed—what I say is the result of a course of observation that commenced full sixty years ago—has been engrossed in keeping the minds of the rising generation excluded from the whole field of politics and morals. Poetry and the empty or delusive sort of literature styled classical, being the pursuits to which the universal attention has all along been directed by whatsoever of the nature of reward has ever been applied to so much as the show of merit. Idleness, dissipation, and drunkenness have been regarded as virtues, and as such secretly cherished, rather than that the minds of the ruling few in their growing state should be turned towards the science so aptly styled by you the Social Science—that science, in the progress of which the allied powers of tyranny corruption and delusion have so long and so clearly beheld their final downfall! Oxford, in which, without instruction of any shape, except the little that could originate in my own unfurnished uncultivated and unassisted mind, I consumed in vapid idleness five or six of the most precious years of my life, after five spent in learning Latin and Greek at the great public school of Westminster, another poison-instituting seminary.'

Núñez' political engagements, and his share in composing the University of Salamanca's comments on the Draft Penal Code, prevented him from answering this letter until December 1821. But, within a fortnight of receiving that answer, Bentham sent a rejoinder, accompanied by a manuscript summary of some books that were still uncompleted. This rejoinder has also been preserved by Doña Javiera Núñez, and is dated February 12, 1822. It expresses Bentham's fears of the 'mass of misery impending over Spain, in consequence of the concentration of executive power in the hands of the king—a man placed in a situation which renders him completely necessarily and incurably hostile to everything that is contributory to the greatest happiness of the greatest number.' And Bentham adds, 'for averting this mass of misery from your country my main trust is in *you*.'

Señor Silvela assumes that Núñez 'did not proceed with the publications promised in his prospectus of 1820, for no volume of them is known to exist.' But in this respect London seems to be richer than Madrid; for the British Museum does possess the opening volume of the proposed recasting of Benthamism. It is entitled 'Principles of Social Science, or of the Moral and Political Sciences, by the English jurist, Jeremy Bentham; arranged in accordance with the original author's system, and applied to the Spanish Constitution, by Don Toribio Núñez.' Its contents occupy about 560 pages; and are concerned with the moral 'arithmetic, logic, anatomy, physiology, pathology, and nosology,' which, as we

have seen, were to form the first volume of the promised triad. The preface, addressed to the young men of Spain, declares the author's aim to be 'to link Socrates' philosophy to Bentham's, by the help of Kant's'; or, in other words, to use the German's account of man's moral judgments as a logical foundation for that Utilitarian ideal which the Greek had suggested, and which the English philosopher had supplied the means of pursuing with precision. It was issued by the same press at Salamanca which had issued the preliminary 'Spirit of Bentham'; and it bears the date of 1821. But Nuñez' entire silence about it, when writing to Bentham so late as December 20 of that year, suggests the inference that it cannot really have appeared until 1822.

Nuñez, by that time, had been elected by the province of Salamanca as one of its deputies to the Cortes; and he took an active part in the debates upon the Code of Procedure and upon the measures to be taken for punishing the insurgent royalists who were already threatening the overthrow of the parliamentary constitution. It was almost inevitable that this volume of abstract jurisprudential 'Principles,' issued in those anxious days, should fall stillborn into oblivion. The Cortes managed to survive till 1823; retreating from Madrid to Seville, and finally from Seville to Cadiz, to die in the city which gave it birth. Nuñez, staunch in his Liberalism, took an active part in its labours and its dangers, until the moment when French bayonets re-established absolute monarchy. He then sank into poverty; and the man, who in 1821 had described himself to Bentham as having amassed fortune sufficient to maintain himself and his family comfortably, had at last to rely for support upon his son's labour. After living for eleven years at Seville in these straitened circumstances, he fell a victim to cholera in 1834. The admirers of his works defrayed the expenses of his funeral; and placed over him an epitaph commemorating his high character, but 'leaving the eulogy of his virtues to the posterity which his immortal writings will render happy.'

During those final melancholy years Nuñez continued to prosecute his studies of Utilitarianism; and Señor Silvela feels assured that Bentham, who survived till within two years before Nuñez' death, must have continued to assist him with letters and manuscripts. But no direct evidence of all this seems to be forthcoming at the present day. We know, however, that Nuñez at his decease left behind him a manuscript treatise; which his sister-in-law and legatee, Doña Ignacia Osorio, presented to the Spanish government. The government submitted the book for an opinion upon its merits to a Commission which was then sitting to draw up a Civil Code

(and of which Pacheco, a still famous Spanish writer on Criminal Jurisprudence, was a member). On their recommendation, it was sent to the press by royal order. It appeared in 1835, in the form of an octavo volume of 564 pages; under the title of 'Social Science, according to the principles of Bentham.' To it was prefixed a preface, written by the Commissioners, which, after giving an account of the literary labours of Bentham and of Dumont, proceeds to state that 'Nuñez, being more deeply penetrated than Dumont with the actual spirit of Bentham, succeeded, by help of assiduous study, in realizing Bentham's great design, by entirely recasting the works put out by Dumont and consolidating them into a coherent body of doctrine. When this task had been accomplished, he submitted the result to Bentham himself; who, in autograph letters written in English, which have been laid before the Commission, assured Nuñez that he had caught his true spirit (*que había adivinado su verdadero espíritu*). As we have already seen, even Dumont's great expositions had not received such an endorsement from the Master. But one cannot help feeling that these words of eulogium are so akin to the 'Thy mind is the very child of mine' (with which the Master had greeted the preliminary discourse on the Spirit of Bentham) as to justify a doubt whether the letters perused by the Commissioners had really any connexion at all with the posthumously published manuscript composed in Nuñez' declining days, and were not simply the two (still extant) epistles, of an earlier period, in which we have seen that phrase. And when Nuñez himself, in this posthumous work (p. xxxi), speaks of having received approbation from Bentham, it is in terms that seem to refer only to his early pamphlet, the 'Spirit of Bentham.'

However great may have been Nuñez' qualifications for the task of outrivalling Dumont, the absence of Dumont's familiar name, and of the still more familiar titles of his works, impaired the book's prospects of attracting attention; and perhaps amongst Spanish men of letters its circulation was not likely to be promoted, in that period of hated Absolutism, by its having had the honour of issuing from the royal press. The fact at any rate remains that, according to Señor Silvela's testimony, this posthumous fruit of the honourable and pathetic life of Nuñez soon sank into obscurity even in its own country. No copy of it is to be found in the libraries of the British Museum or the Inns of Court; but, with some trouble, I recently obtained one in Madrid.

The object of this volume was, as the preface suggests, to consolidate Dumont's chief writings — correcting at the same time various errors into which the facile pen of the Genevese had carried him — into a compact body of doctrines, all deducible from the

simple basis of general utility. It is in some sort a fulfilment of the promise, made in the 'Preliminary Discourse,' to codify Benthamism. As we have seen, a first volume of that codification had already been published, a dozen years before its author's death. But this posthumous book is a separate work, though occupied partly with the same ground which that volume had traversed.

Cambacères, sixty years previously, had made famous the phrase 'Social Science' in the discourse which he delivered at Paris before the Académie des Sciences morales et politiques upon 'l'art de faire jouir du bonheur la société.' Nuñez' posthumous volume is a systematic exposition of what he describes as the 'theoretical' portion of this science. Its first and second books cover the so-called Moral Arithmetic, Moral Logic, Moral Anatomy, Moral Physiology, Moral Pathology, and Moral Nosology, which had already been written upon in the volume dated 1821. Its third book is occupied, to continue his medical terminology, with Moral Therapeutics, the various direct remedies—preventive, suppressive, satisfacient, and penal—for breaches of law. The fourth book, on Political Dynamics, deals with those remedies which are indirect. The fifth and final book, on Social Hygiene, purports to give an account of the jural constituents of a state of true public happiness. The theoretical portion of Social Science having thus been completed, Nuñez admits that it ought to have been supplemented by a book on the practical or 'Clinical' portion, which would include the topics discussed in Bentham's works on Judicial Evidence, Judicial Organization, and Political Tactics. But, in part excuse for its omission, he pleads that Dumont had understood this part of the science better than the earlier and theoretical parts—parts on which, unhappily (p. xxi), 'Sir¹ Bentham handed to Mr.¹ Dumont original MSS. of his theories from which the latter composed those undigested French treatises that till now have kept under eclipse that light of Bentham's which glimmered through them, but which in the present volume shines out in clearness and brilliancy.'

COURTNEY KENNY.

¹ *Sic* in Nuñez's text.

ONE MAN COMPANIES.

I SEE no reason,' said Sir George Jessel, 'why three persons as well as seven might not contract to carry on business wholly free from liability beyond what sums they subscribed if it were duly notified to their creditors, or why one person might not do it—why he might not advertise, for instance, that he has put £10,000 into a concern and will not be liable for a shilling beyond it. If John Brown started a company, John Brown, Limited, and deposited a notice with the Joint Stock Co.'s Registrar that John Brown, Limited, was a company consisting of John Brown, and that he had put £10,000 into it and was not to be liable for anything beyond that, I see no objection to that being allowed. Anybody dealing with John Brown would know that.' 'I think,' he added, 'there should be the means of allowing people to go into partnership with limited liability.' The commercial world thinks so too, and the multiplication of private companies is striking evidence of the fact. Whether the Legislature contemplated the use of the machinery of the Companies Act, 1862, for this purpose may be doubted. Vaughan Williams J. thinks it did not. But such companies are clearly within the letter of the Act, and a good deal may be said for their being within the policy of the Act too. The advantages they offer have been perseveringly preached by Mr. Palmer. Incorporation secures first of all the benefit of limited liability. It further preserves the continuity of the partnership unaffected by the death, lunacy, or bankruptcy of the members or by other contingencies. It minimizes the dangers of a dishonest partner by restricting the agency of the directors in articles of which all persons dealing with the company have constructive notice. It facilitates dealing with the shares of the partners by sale, mortgage, or settlement. It affords greater facilities for borrowing, more particularly for raising money on debentures. A shareholder who lends money to the company is not at the disadvantage of being postponed to other creditors as an ordinary partner is who lends to the firm (Partnership Act, 1890, s. 44). If a syndicate is to be formed a private company is the most convenient shape it can take. These advantages are real advantages—practical and substantial advantages to the trader—and, what is more, they are all legitimate advantages. Thousands of honest private trading companies have

been formed on these lines and are growing and flourishing concerns. But tares grow with the wheat in this world, and there are certain phases of private company promotion, pointed out by the latest Companies' Winding-up Report and by recent cases in the Courts, which cannot be commended in the interests of fair trading. Take Sir George Jessel's instance, the proprietor of a chandler's shop. He buys Mr. Palmer's little book, let us say, or he gets a circular from an agency pointing out the advantages of incorporation and undertaking to obtain it for him with limited liability for a fee of five guineas, and he is minded to turn his business into a company. It may be he wishes to make it a family business; it may be he hopes to give it a factitious importance, which the addition of the magic 'Co.' is well known to do; it may be he wants to raise money by the issue of debentures. There are a dozen legitimate motives for desiring incorporation, and it is really difficult to discover what illegitimate object he can serve by doing it. If he wants to palm off a declining business at a large profit he offers it by prospectus and asks a confiding public to subscribe: he does not form a private company; if he did, he would only be defrauding himself or his partners or his family. If he wishes to get rid of his indebtedness, he does not form a private company—it is no use. A transfer of a business by an insolvent to himself under a corporate name would be void under the statute of Elizabeth as defeating and delaying creditors; *Broderip v. Salomon* (W. N. 1895, 38). Suppose him then incorporated as a so-called one man company with six dummy signatories, clerks, employes, or members of his family. The Companies Report in horrified italics points out that this 'virtually amounts to one man trading with the full protection of limited liability.' It is quite true—it does. But is there any harm in that? Every company is in a sense a one man company, that is to say is controlled by a ruling spirit. Directors are mostly dummies, and shareholders mere dividend drawers. Unity of management and control is from a commercial point of view a most desirable thing. As to the persons who deal with the incorporated trader—the one man company—they all know he is limited and know what his capital is. What, unfortunately, they do not know is how that capital is charged, and here it is that the real mischief comes in. The vendor, the private company promoter, cannot of course get his price paid in cash, so he takes it in first mortgage debentures charged by way of floating security on the whole property of the company, including its uncalled capital. These debentures he may hold himself, as he did in *Broderip v. Salomon* (supra), or transfer to a creditor of his own, as he did in *Davies v. Bolton & Co.* ('94,

3 Ch. 678), or he may sell them, as he easily can, in the market. Whichever he does the result is the same. The company commences trading and incurs debts to unsecured creditors. If it succeeds, no difficulty of course occurs; if it fails, down sweep the harpy debenture holders and lay hands on everything, leaving nothing for the unsecured creditors. This is of course a genuine grievance, and Vaughan Williams J., as the experienced critic and censor of company operations, has just given checkmate to the vendor debenture holder in such a transaction, by holding that where a private company is to all intents and purposes the promoter's corporate self—himself and six dummies—the company is the mere agent of the promoter-vendor, and as such entitled to be indemnified by the promoter-vendor as principal against debts incurred in carrying on the business. This is a novel view, and whether it will be affirmed by the Court of Appeal remains to be seen. Control of the company the most complete may exist and yet may not constitute agency. It seems to be in every case a question of fact; but what we are concerned to point out is that the real mischief comes not of one man turning himself into a company and trading with limited liability, but of the unlimited borrowing powers allowed to limited companies. When the privilege of limited liability was conceded, it was conceded on the terms that the subscribed capital should be inviolable. It was to be paid up in cash. It was to be irreducible. That was the price of the privilege—the creditors' security. No doubt the Companies' Act 1862 contemplated a limited company borrowing. The Register of Mortgages shows that it did. But there is not a word in the Act to indicate that it contemplated a company mortgaging or charging its uncalled capital, and in the earlier cases the Courts, with a true instinct, though for a wrong reason, held that it could not be done (*Stanley's case*, 4 D. J. & S. 407). Now it is universal.

Floating debentures that sweep away the company's whole assets have this further vice. The liquidation of the company becomes a debenture holders' administration, not a winding up by the Court. The Court will not as a rule make a winding-up order where the charges exhaust the assets and leave nothing for the unsecured creditors, and if the Court, feeling the importance of an investigation, does make a compulsory order in such a case, as it did in *In re Krasnapolsky Restaurant Co.* ('92, 3 Ch. 174), the Official Receiver cannot by the winding-up rules, if the assets are nil, take any proceedings without the sanction of the Board of Trade—a sanction, of course, which can only be expected to be given in very clear cases. Thus the salutary provisions for investigation and punishment of fraud are defeated. What then is the remedy?

Plainly, first, to restrict the borrowing powers of limited trading companies, whether they are public or private companies, limiting it to one-half or at most two-thirds of the company's property in the same way that companies formed under Royal Charter or by Special Acts are limited; and, secondly, by securing that all persons dealing with the company shall have the means of knowing the extent to which the property of the company is mortgaged or charged. The Court of Appeal has in *Standard Manufacturing Co.* ('91, 1 Ch. 627) dispensed with registration of debentures or trust-deeds, charging chattels, under the Bills of Sale Acts, on the ground—and a very reasonable one—that double registration is not wanted; but this presupposes that the company's register under s. 43 is sufficient notice to persons dealing with the company, and it is well known that it is not. The suggested amendments are simple and practicable, and can do no possible harm to legitimate trading. Drastic reforms are to be deprecated.

The giant growth of joint stock enterprise is one of the marvels of our day. Whatever hard things may be said of it, it has conferred very great benefits on the community. It has given an enormous impulse to trade; it has unlocked by the magic key of limited liability vast sums for useful industrial undertakings; it has made the poor man, by co-operation, a capitalist. Let us beware lest in gathering the tares we root up the wheat also.

EDWARD MANSON.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

L'Intervento della Difesa nell'Istruttoria. Per UGO CONTI. Estratto dalla Rivista Penale. Vol. XLI, fasc. I. Torino. 1895. 8vo. 43 pp.

As the author of this pamphlet justly observes, the whole system of Italian Criminal Procedure calls, not for partial modification, but for thoroughgoing reform.

Signor Conti deals with only one point, the extent to which an accused person should be allowed to have legal assistance during the *istruttoria*. The proceedings to which this term applies correspond with the examination before a magistrate in this country, but differ from such examination in many essential respects. The *istruttoria* is admittedly inquisitorial, and its prototype may be recognized in the Roman criminal procedure as developed under the Empire. From her Germanic invaders Italy borrowed, during the feudal period, the accusatorial system with its well-known incidents of publicity and of judicial impartiality (at least in theory) between the aggrieved prosecutor and the defendant. The accusatorial system declined throughout Italy, and in a great measure throughout Europe, with the growth of monarchical principles, and (as M. Tanou has lately shown) with the extension of the Inquisition, eminently so called, which applied the inquisitorial system to every stage of the trial.

The French Code of Criminal Procedure of 1808, on which the one now in force in Italy is modelled (superseding a decree of 1789 which gave much greater privileges to the accused), adopted the so-called *mixed* system, according to which the preliminary investigation is conducted on inquisitorial, the final trial on accusatorial, principles.

Signor Conti passes in review the laws which regulate this department of criminal procedure in foreign countries. He admires the English system, but appears to consider it unsuited to the national character and political institutions of the Italians.

Among the reforms he advocates, the principal one is that the accused should have legal assistance—gratuitously, if he cannot afford to pay—from the time he is formally charged; and Signor Conti takes occasion to animadvert (as the Count de Franqueville has done) on the practical inequality in the administration of justice, as between rich and poor, that the absence of a similar provision in this country gives rise to. On the other hand, the functions of the *difensore*, i. e. solicitor or counsel for the defence, would under the author's proposed system be somewhat circumscribed. His proposals, though liberal as compared with the existing practice, only go the length of allowing the *difensore* to see his client after the latter has undergone his first interrogatory; i. e. after a possibly innocent defendant has been entrapped by an artful examiner into admissions or contradictions

to be used against him. In other respects too the defence would have much less freedom, even with Signor Conti's reforms, than we are accustomed to here. The learned author does not seem to think it as important as English publicists do to enlist common opinion on the side of law by the openness and impartiality of its proceedings. In any case, his paper is a valuable guide, and contribution, to the bibliography of the subject.

T. BOSTON BRUCE.

A Practical Treatise on the Criminal Law of Scotland. By J. H. A. MACDONALD. Third Edition. Revised and edited by the Author and N. D. MACDONALD. Edinburgh: Wm. Green & Sons. 1894. xv and 652 pp.

THIS treatise, which is from the pen of the present Lord Justice Clerk of Scotland, one of the presidents of the Court of Justiciary, must naturally be regarded as a work of high authority, but unfortunately it is, as it professes to be, no more than a handbook for use in the everyday practice of the Courts. The profession must regret that they have not been favoured with any discussion of legal principles, or any attempt at scientific analysis of the doctrines of the criminal law by one whose long experience, both as a Crown Prosecutor and Justiciary Judge, has given him such exceptional opportunities for writing an institutional treatise.

Mr. Macdonald's book has for a good many years enjoyed a large measure of popularity among practitioners in the North, having been indeed, since the publication of the first edition in 1866, without a rival of its kind. Important alterations have been made in the present edition; the changes effected by the Criminal Procedure (Scotland) Act, 1887, having necessitated the re-writing of a considerable part of the work devoted to Procedure.

To an English lawyer the book will be instructive as showing, in concise form, the rules of criminal law and practice in force in a neighbouring country so intimately connected with his own. He will see that in a great many respects the Scottish system is widely different from the English, and that in some matters it is distinctly preferable. One of the most prominent instances of its superiority is undoubtedly the complete provision that is made for public prosecutions. In Scotland there is practically no such thing as a criminal action at the instance of private individuals; every prosecution has to be conducted by public officials who hold appointments for the purpose. In the Court of Justiciary these officials are the Lord Advocate and Solicitor-General, assisted by four or five Advocates of standing and experience, called Advocates-depute—all of whom are instructed by a Solicitor for the Crown, called Crown Agent. In the Sheriff Courts the duties of prosecution are performed by the Procurators Fiscal, who hold permanent appointments, but are subject to the supervision of the Justiciary officials.

Another point in which the Scottish system seems to be preferable to our own is the provision made for the defence of criminals. There is no such thing as the trial of an undefended prisoner in Scotland except where, as rarely happens, the prisoner positively refuses assistance. The practice is for a certain number of solicitors for the poor to be appointed annually in every local court of jurisdiction by the professional bodies to which they belong, and it is the duty of these persons to plead for poor criminals in the inferior courts, and to instruct counsel for their defence at the Assizes or

the High Court. In England when, as often happens, a prisoner is left without professional assistance, the judge seems to be expected to look after his interests. But this is not satisfactory, as it tends to disturb the judicial balance, and, besides, a judge cannot know what evidence may be available. It is surely not edifying to see a prisoner wrecking, through stupidity or ignorance, what might in skilled hands have turned out to be a perfectly reasonable defence.

The value of the Scottish verdict of 'Not Proven' and the verdict by a majority of the jury instead of a unanimous one, may be open to controversy. We confess that we would prefer a jury of twelve returning its verdict by a majority of three-fourths, rather than the system at present in vogue in either country. Certainly the requirement of a unanimous verdict occasionally leads to great expense, owing to the necessity for new trials. What if there had been one pig-headed juror in the trial of the Tichborne claimant!

One thing, however, seems plain, and that is, that Scotland, like England, is greatly in need of a criminal code. Whatever may be said against the codification of the civil law, the arguments in favour of a criminal code seem invincible. In reading through Mr. Macdonald's book, one sees that there are a considerable number of so-called 'open questions' still existing in the law—doubts whether certain *species facti* constitute a crime or not. Take, for example, theft. For a century or more it has been left an open question whether a wife can steal from her husband. On p. 21 Mr. Macdonald says, 'In one case the accused being the wife of the owner was assoltied. In another, the objection that the things stolen belonged to the husband of one of the accused, was certified for the opinion of the Court, and no further proceedings took place. But it has not been decided that a wife cannot steal from her husband.' Why should such an important question as this be left unsettled—to be decided perhaps by some judge in some future case according to his particular idiosyncrasy? So also Mr. Macdonald finds it necessary to enumerate in the category of crimes a considerable number of offences which it is almost quite certain have ceased to be crimes, owing to desuetude. For example, would 'Cursing of Parents,' and 'Hamesucken,' be now prosecuted under the old Scots Acts which introduced them? A Crown Prosecutor would probably be ridiculed if he attempted to do so. But why should these matters be left in uncertainty?

The author states without comment that carnal intercourse with a deceased wife's sister is incest, and punishable with either penal servitude or imprisonment. Prior to 1887 it was a capital offence. This may startle some loose moralists south of the Tweed, but we may relieve their minds by asserting that long prior to 1887 the law was in desuetude.

H. G.

A Compendium of Sheriff Law, especially in relation to Writs of Execution.

By PHILIP E. MATHER. London: Stevens & Sons, Lim.; Sweet & Maxwell, Lim. 1894. 8vo. xlviii and 578 pp. (25s.)

MR. MATHER's book comprises the whole duty of an under-sheriff, and to under-sheriffs it ought to be an indispensable companion.

It purports to be a compendium rather than a treatise, and as such is particularly rich in its tables of cases, of statutes, and of rules and orders. A rather serious omission is the absence of any allusion to Sect. 26 of the Sale of Goods Act, 1893, which deals with the effect of writs of execution, and in some respects alters the existing law. The Common Law rule

correctly stated on p. 81, that 'goods seized under a fi. fa. are bound from the date of the teste of the writ, except as against purchasers in market overt,' is scarcely reconcilable with the new enactment, that 'a writ of fi. fa. . . shall bind the property in the goods . . . from the time when the writ is delivered to the sheriff to be executed.' To make this date perfectly clear, the section of 'The Sale of Goods Act' goes on to provide that it shall be the sheriff's duty to endorse on the back of the writ 'the hour . . . when he received the same,' a provision to which attention should certainly have been called in 'a practical work for under-sheriffs.'

The bulk of Mr. Mather's book necessarily deals with the Law of Execution. It is clear from his preface that the author does not aim at bringing out an original 'treatise' on this subject, like that of Mr. C. J. Edwards, to whom among others his obligations are acknowledged, but rather at providing 'a compendium' from various sources of all the law with which an under-sheriff is likely to be practically concerned.

This object is fully achieved. Besides containing a practical discussion on the law as to the various writs of execution, Mr. Mather's book deals with the duties of sheriffs and under-sheriffs in connexion with Assizes and Sessions, Criminal Execution, and the assessment of Damages and Compensation. Even ceremonial matters such as 'dress' and 'precedence' are adequately discussed by our author. His book brings together within a convenient compass from many other departments of law, a full digest of authorities on every branch of sheriff law: e.g. we do not think there are any cases on the law of execution against companies, to be found in 'Chadwyck-Healey' or 'Buckley,' which are not referred to in the work before us. We heartily commend it, not only to under-sheriffs, but to members of both branches of the profession.

S. H. L.

The Law relating to Losses under a policy of Marine Insurance. By CHARLES ROBERT TYSER. London: Stevens & Sons, Lim. 8vo. xvii and 232 pp. (10s. 6d.)

MR. TYSER has endeavoured to avert the obvious criticism that specialization may be carried too far if it results in separate works on the Bill of Lading Exceptions, or, as in this case, on Losses under a marine policy, by the warning in his preface that no one who is acquainted with the subject treated of will make such a criticism. With due notice of the risk of writing himself down ignorant before his eyes, the present critic yet ventures to doubt whether it is desirable to treat part of a subject by itself in this way. It seems better for the writer to be compelled to take a wide view of the whole subject; and it is convenient for the reader to have the whole subject in one book, and not to have to search for the law, for instance, as to warranties, in another work. But having made this criticism, we have little but praise for Mr. Tyser's work. It is thorough and careful, and an intelligent treatment of a difficult part of a difficult subject. The author has taken great pains to be short and clear, a task which takes more time than those who have not tried it would think. He clearly defines the terms used, illustrates them by examples, and justifies them in the notes by cases, but does not confuse them by long extracts from judgments inserted in the text. More use might perhaps have been made of the cases on bill of lading exceptions, which are frequently useful on the construction of similar words in the list of perils insured against. For instance, we should expect to find some reference to *Steinman v. Angier Line*, '91, 1 Q. B. 619, under

the peril 'thieves.' The short chapter on General Average is perhaps the least satisfactory part of the book, but General Average is a difficult subject, whether in brief or at length.

T. E. S.

The Theory and Practice of the Law of Evidence. By WILLIAM WILLS. London: Stevens & Sons, Lim. 1894. 8vo. xlv and 336 pp. (10s. 6d.)

THERE is hereditary propriety in the appearance of a book on the Law of Evidence by a member of the Wills family, and no member of that family need be ashamed of that which Mr. William Wills now publishes. It is the result of a course of lectures delivered some years ago by the author to the students of the Incorporated Law Society, and though Mr. Wills ascribes to himself the 'twofold aim' of a text-book for students and a handbook for use in practice—"for the ordinary run of *nisi prius* and criminal work"—it is probably rather in the former than in the latter capacity that it is likely to achieve durable success. The introduction contains a good many sound observations, especially where the author points out the facts that, for the reasons he gives, the law of evidence is considerably less strictly construed at *nisi prius* than it used to be, that most of the important decisions on the subject are old, and that, therefore, while it is important in the conduct of litigation to ascertain what is the proper evidence, and provide oneself with it, it is not wise to rely too confidently upon the law of evidence to overcome the strength 'on the merits' of an opponent's case. Mr. Wills conceives that the 'logical order' in arranging the subject is to put the 'burden of proof,' including a brief disquisition on the 'right to begin' and the 'obligation to begin,' first, and proceed afterwards to discuss 'relevant facts,' and the manner of proving relevant facts, which he divides into the perhaps not very elegant titles, 'Media of proof,' and 'Adduction of evidence' (Is not 'adduction' for 'production' more pedantic than accurate?). We should have said that inasmuch as it does not matter whether the Court will or will not take judicial notice of a fact, or whether or not there is a presumption concerning it, until the fact has been ascertained to be relevant, the 'burden of proof' came more naturally and quite as logically, after relevance, as part of the manner of proof; but the question is of little importance, and the three chapters included under the heading here put first are not long. The work is, in point of arrangement, essentially in the nature of a digest, and of the school of which *The Digest of the Law of Evidence* is the earliest noteworthy example, but it is a digest clothed with comment for the benefit of the student. Mr. Wills incidentally observes that in an opening speech 'it is necessary not to present the important facts in too bare a manner, if they are to be followed with ease by the listeners,' and in his book, as doubtless in his lectures, he has been mindful of his own precept. Throughout the volume his references to underlying principles are judicious, and show a real understanding of the subject. It is decidedly a meritorious work.

Conveyancing and Settled Land Acts, and some other recent Acts affecting Conveyancing, with Commentaries. By H. J. HOOD and H. W. CHALLIS. Fourth Edition, by the Authors, assisted by H. A. COLMORE DUNN. London: Reeves & Turner. 1895. 8vo. xliii and 516 pp.

IN our review of the last edition of this book we stated that it had attained a high standard of excellence. We are pleased to see that the

public agrees with us, and that a new edition is required. If we may judge by odd blunders that we meet, not only in reported cases, but in private practice, the knowledge of the law of real property is less widely spread than it was some twenty years ago. One of the advantages of the book now before us is that real property law is stated with great correctness. There are a few matters capable of controversy where the authors do not discuss the opinions with which they do not concur, ex. gr. 'descendible estates,' p. 21; 'leasehold tenure,' p. 9. We can hardly blame them for taking this course, as, if they had acted otherwise, they would have added largely to the bulk of the book, and probably those few of their readers who would be willing to consider matters of this nature already know where they can find them discussed.

The question whether the decision of Stirling J. in *Ailesbury v. Iveagh*, '93, 2 Ch. 347, is correct may possibly be of very great importance with regard to the incidence of Estate Duty, and we therefore regret that the authors have not discussed it at length.

The Acts commented on are—The Vendor and Purchaser Act, 1874; The Conveyancing Acts, 1881, 1882, and 1892; The Settled Land Acts, 1882, 1884, 1887, and 1890; The Trustee Acts, 1888, 1893, and 1894; The Married Women's Property Acts, 1882, 1884, and 1893; and The Land Charges Regulation and Searches Act, 1888. As far as we have been able to ascertain all the cases decided on these Acts are mentioned. The table of cases contains references to all the reports, and there is a very good index.

In conclusion, we urge on our readers to buy this book and to judge for themselves whether our praise is not well founded.

An Outline of English Local Government. By EDWARD JENKS. London: Methuen & Co. 1894. 12mo. 229 pp.

THE aim of this book is stated to be to give to the non-professional citizen some reasonably coherent ideas concerning the mass of local government machinery. To do this successfully within the space of 229 small pages is a task of great difficulty; and the author may be congratulated on having reduced into a clear and readable form the chaos of statutes, decisions, and orders with which he has had to deal.

The only part of the work which we have difficulty in understanding is the introductory chapter, in which, after a not very successful attempt to distinguish central from local government, five points are stated 'to serve as a kind of life-saving apparatus after the great plunge.' We are told that in new countries the local organs are a creation of and subordinate to the central government, whereas in an old country like England the central government is the creature of and historically subordinate to the local organs. The first part of this proposition may or may not be true, but surely the second part is not true as regards England. We should have liked to hear William the Conqueror's or Henry II's answer to any one who dared suggest it to him. No doubt townships, hundreds, and shires are older than Parliament, but what have these to do with modern local government? The hundred as a unit of government has long been dead, so has the township, except in a few places where it survives as a highway parish. The shire indeed exists as the county, but county government by Quarter Sessions, County Council, and Standing Joint Committee is the creation of statute, and the sheriff represents not local but central government. So, too, Vestries (as regards their civil powers at least), Overseers, Parish and

District Councils, and Guardians of the Poor, all emanate from Parliament. In the liability of the highway parish to repair its highways we have some trace of the Common Law, but that is a case of subordination of local to central government. It is the Crown that indicts the inhabitants for non-repair. Names and areas may be ancient, but local government is almost entirely statutory, and in large part dates back no further than this century.

The attempt to find in archaic institutions the key to our modern system leads to the strange device of treating every one of the new governmental areas as analogues of one of the old divisions. Thus the Petty Sessional Division, County Court District, Union, Sanitary District and Highway District are treated of under 'the Hundred and its Analogues.' The analogy, however, is very superficial. In mere size the Union may often resemble the Hundred; but there the analogy stops. Fainter still is the analogy of an ordinary Urban District with a Hundred.

The classification of the subject wholly by areas leads to confusion and repetition in dealing with the matters of government. Thus we nowhere get a continuous account of the police system, or of the powers of Justices, or of sanitary matters, and of the relationship one to another of the various bodies having control of each of these matters. The powers of Justices in Petty Session is the subject of Chapter V, whilst Quarter Sessions and Justices out of Session are treated of in the chapters on the County and the Borough.

Mr. Jenks assures his readers that he has 'never been guilty of the rashness of making a statement without verifying it at the fountain-head.' In view of the many mistakes in detail that we have found throughout the book, we have difficulty in accepting the assurance. But, assuming that there is authority for every statement, it is tantalizing to have no means of discovering those authorities. We should like, for instance, to know when it was decided or enacted that a chairman at Petty Sessions has a casting vote. Has *Reg. v. Ashplant* (52 J. P. 474) been overruled? Again, it is said that the Local Government Act, 1894, transferred from Justices out of Session to 'the Sanitary Authority' the power 'to regulate fairs.' The transfer is in fact to District Councils; and the power transferred is that of making a representation to the Home Secretary that it is desirable to abolish, or change the date of, a fair. Surely the owner or lord of the fair alone 'regulates' it.

These are but samples; and though there are many like them, nevertheless the book contains much that is good and useful for students desirous of a general view of our institutions. Yet for these, and still more for lawyers, it would be much more useful if the author had given references to his authorities. To the student references to the leading text-books are invaluable for guiding him to the sources of fuller information; to the lawyer no book can be of much use unless he can thereby find his way to the statutes and reported cases.

An Outline of Local Government and Local Taxation in England and Wales (excluding London). By R. S. WRIGHT and HENRY HOBHOUSE. Second Edition, by HENRY HOBHOUSE, M.P., and E. L. FANSHAW. London: Sweet & Maxwell, and P. S. King & Son. 1894. La. 8vo. xxii and 152 pp. (7s. 6d.)

WE cordially welcome a second edition of this most excellent summary of Local Government law. The first edition, by Mr. Justice Wright and

Mr. Hobhouse, appeared in 1884. Since that time there have been passed the Local Government Acts of 1888 and 1894, one of the objects of which was the simplification of our institutions. This process has consisted in creating several new bodies, such as County Councils, Standing Joint Committees, Parish Councils and Meetings, and new areas called administrative counties and county boroughs, whilst keeping alive all the old bodies and areas except some of the highway authorities and districts. These complicated changes have necessitated the re-writing of several chapters, and the new work seems to be quite up to the high level of the old in lucidity, terseness, and accuracy.

The book is divided into three parts. In the first the area, organization, and purpose of each unit of local government is clearly explained. Part II, dealing with matters of local administration, contains admirable summaries of such branches of the law as those touching poor relief, public health, highways, licensing, and many others. The third part consists of a neat account of local finance, together with tables showing the local indebtedness and taxation of the country.

For a book dealing with so large a mass of complicated detail it is wonderfully free from mistakes. The only noteworthy inaccuracies we have been able to find are the following:—On page 2 it is said that the Parish Meeting chooses its own chairman. This is true only of parishes which have not Parish Councils. In those which have Councils, the chairman of the Council is chairman of the Parish Meeting, unless he is a candidate for election as a Parish Councillor at that meeting.

The qualification of Borough Councillors is stated more accurately than it was in the first edition, but still not quite correctly. For it is not said that in order to be on the separate non-resident list, a person must be qualified as a burgess in every respect except that of residence.

On page 22 it is stated that 'the mayor and last ex-mayor are justices for the borough.' This is a misleading paraphrase of s. 155 of the Municipal Corporations Act, 1882, which enacts that 'the mayor shall by virtue of his office be a justice for the borough, and shall, unless disqualified, continue to be such a justice during the year next after he ceases to be mayor.'

We regret that the authors have not given fuller references to authorities. As a rule the statutes are given in the margin, but not the sections, and important amending Acts are sometimes omitted—such as the County Electors Act, 1888, amending the Municipal Corporations Act, 1882, s. 9. Cases are not often quoted, and where they are, the references are sometimes inadequate—such as '*Thomas v. Hill*, 1893, Q.B. App. 565;' '*Etherley v. Auckland*, C.A. Nov. 1893.' Both of these cases are reported in the Law Reports, and the volumes and pages might easily have been given.

The Law of Ejectment or Recovery of Possession of Land. By JOHN HERBERT WILLIAMS and WALTER BALDWIN YATES. London: Sweet & Maxwell, Lim. 8vo. lxix and 404 pp. (16s.)

FOR the man who cannot find a new subject, the next best thing is a subject upon which no book has been written for forty years past. This is what Mr. Williams and Mr. Yates have found in 'Ejectment,' the old-fashioned phrase which prevails still despite the Rules of Court. They have discussed their subject succinctly and yet fully: their power of stating their matter clearly and arranging it well is remarkable. Not the least useful part of their neat book will be found in the Appendix of Statutes, beginning with Richard II and ending with the Local Government Act of last session,

which covers nearly ninety pages, about a quarter of the substantive work. The writers refer to many of the cases which have been decided upon a difficult and intimate branch of the law. But we are surprised not to find on page 94 the well-known case of *Powys v. Blagrove* (4 De G. M. & G. 448), deciding that an equitable tenant for life is not responsible for permissive waste. And when the table gives the multiplied references to various reports, it might also give, not only the dates of the cases, but also their full names. In a book which deals with a branch of the great subject 'Landlord and Tenant,' Doe is not, standing alone, a distinctive name for a plaintiff. These, however, are small things, which may serve as reminders for a second edition. Hitherto we have been accustomed to turn to 'Foa' upon a question of tenancy. Now when we want to go further, and delve into a point of ejectment, we shall turn to 'Williams and Yates,' and it is certain that we shall not fare worse.

Rogers on Elections. Vol. III. *Municipal Elections and Petitions.* Seventeenth Edition. By S. H. DAY. London: Stevens & Sons, Lim. 8vo. 1894. xxvii and 780 pp. (21s.)

THIS volume is a standard authority on a subject of daily increasing importance. The Local Government Act, 1894, has established municipal or quasi-municipal bodies throughout the land, and has materially altered the law as to London.

Under these circumstances a new edition of this volume was a necessity, and the thanks of the public, and especially of local officials and candidates, are due to the Editor.

Perplexing everywhere, the law on the subject is now especially so in London, where it is full of pitfalls. Even persons of experience may be excused for not always bearing in mind the distinction between the Vestries mentioned respectively in Schedules A and B to the Metropolis Management Act, 1855; yet the distinction between them is great, the former being themselves the Boards of Works for their districts, while the latter are grouped together so as to form a separate Board for two or more parishes. Vestries of the former class elect for a year a chairman who is to be *ex officio* a Justice of the Peace, while the latter have no such privilege.

The subject of election petitions forms an important part of the volume. If the curious reader wishes to see some instances of human error, let him turn to the examples of doubtful ballot papers given at pages 167-172. These reduced facsimiles of original papers actually used at the Cirencester election are as amusing as useful.

Some idea of the importance to the legal profession of the subject of this work may be gathered from the fact, that out of some twenty cases reported in the January number of the Law Reports (Queen's Bench Division), more than half deal more or less with municipal affairs. In fact, nowadays, only public bodies appear to have the courage, or we might perhaps say the funds, for serious litigation.

Natural Rights: a criticism of some political and ethical conceptions. By DAVID S. RITCHIE. London: Swan Sonnenschein & Co. New York: Macmillan & Co. La. 8vo. xvi and 304 pp.

Law in a Free State. By WORDSWORTH DONISTHORPE. London: Macmillan & Co. 8vo. xii and 312 pp.

NEITHER of these books can be adequately criticized in a review that has to put law as a special science, not the philosophy of law as a branch of

political science, in the first line. Mr. Ritchie stands for a philosophy of the State frankly based on experience, but inclining on the whole to conclusions often associated with speculative socialism. Mr. Donisthorpe stands for an extreme and eccentric individualism, and professes to stand on experience, but he is really as much entangled in *a priori* conceptions of natural rights as any professor of the many faiths that have vouched the Law of Nature to warranty, commonly with the result that the said law, though solemnly called, maketh default.

Mr. Ritchie's dissection of various systems of Natural Rights and their fallacies is not altogether systematic, but it is pointed, stimulating, and generally sound. We should conceive that young students of political theories would find it excellent for clearing the head. Mr. Ritchie is careful to show that 'all abstract theories about human society admit of divergent and conflicting application,' and other such matters which, if not new in themselves, are in constant need of fresh re-statement. He rightly points out that Benthamism, with all its specious show of common sense, is really as abstract as any other universal theory. One of the best chapters is that which deals with 'liberty of association;' Mr. Ritchie shows how this liberty may become a tyranny from which it is the duty of the State to deliver the citizen.

As to Mr. Donisthorpe's book, it is clever, desultory, paradoxical, unequal, sometimes startling, never dull, and (to us at least) never convincing. It contains a serious proposal for the reform of the Adulteration Acts by means of a stringent implied warranty, to be available for a disappointed purchaser without rejecting the goods, and certain proposals for the reform of marriage—let us say back towards Roman republican law—which Mr. Donisthorpe himself cannot expect to be taken seriously by this generation. The student who has assimilated Mr. Ritchie's dialectic will probably rise from Mr. Donisthorpe's book having discovered for himself that individualism is only one kind of *Naturrecht*, and not the best.

The Study of Cases. By EUGENE WAMBAUGH. Second Edition. Boston, Mass.: Little, Brown & Co. 1894. 8vo. xviii and 333 pp. (\$2.50 net.)

THIS work (of which the first edition was unluckily not brought to our notice) aims at teaching students the methods by which lawyers determine the weight and pertinence of reported cases. The knowledge a person accustomed to reading cases must have attained is here for the first time, so far as we know, stated in a theoretical form as a guide to the beginner. In treating of the authority of cases the author makes use of a new terminology. A case, he says, is of 'imperative' authority when it would be followed by a subordinate court without hesitation or question. Beyond those subordinate courts the decision is merely of 'persuasive' authority, while 'quasi-authoritative' is the term applied to *dicta* which have weight but not authority, and which will probably, though not necessarily, be followed.

Four keys are given by which the student may learn to discover the 'doctrine of a case.' The first is that the Court must decide the very case before it, and nothing else. The second is that the Court must decide the case in accordance with a general doctrine; hence the necessity for eliminating unessential circumstances. The proposition evolved after such elimination must be a general rule, without which the case must have been decided otherwise. So far as the opinion of the Court goes beyond

a statement of the proposition of law necessarily involved in the case, the words contained in the opinion are merely *dicta*. Thus the third principle is that the words of the Court are not necessarily the doctrine of the case. Fourthly, the doctrine of the case must be a doctrine that is in the mind of the Court. What makes decisions of value as precedents is the fact that they are based upon reasoning, not upon chance. If it can be shown that a particular point was absent from the consideration of the Court, then as to that point the decision is of no authority whatever.

A dissenting judgment seems, in Mr. Wambaugh's view, rather to strengthen the decision of the majority, as showing that the case was thoroughly debated. We venture to think that something depends on the person of the dissenting judge. Certainly we have read dissenting opinions of Field J. which convinced us that he was right against the majority of the Supreme Court of the United States. It is said again, that a decision given as *per Curiam* 'does not receive as high respect as an opinion vouched for by some one judge, and adopted by the Court.' This is not so in English practice, where a judgment of the Court is prepared by one judge and settled in consultation with his brethren, and usually, though not always (see 7 App. Ca. at p. 360, where Lord Blackburn avows himself the author of a notable judgment delivered in the Exchequer Chamber by Mellor J.) delivered by the judge who prepared it.

There is a short chapter entitled 'How to write a head-note,' which may be studied with profit by young reporters, and will be found interesting even by experienced ones.

To the best of our knowledge, only one book in the literature of the Common Law has made any serious endeavour to deal with these topics, or some of them, before Mr. Wambaugh's. We mean Ram on Legal Judgment, a book of considerable merit, but more than half a century old, and never re-edited. The fact that a second edition of the present work is demanded within three years is enough to show that Mr. Wambaugh has filled a real gap in our provision of students' books: and we think he has filled it very well.

Ruling Cases. Edited by R. CAMPBELL. With American Notes by IRVING BROWNE. Vol. II. Act—Ame. London: Stevens & Sons, Lim.; Boston, Mass.: The Boston Book Co. 1894. La. 8vo. xxx and 791 pp. (25s. net.)

The second volume of *Ruling Cases* enunciates clearly and well the general principles of law relating to the subjects included. The head of 'Administration' appears to us to be particularly well dealt with. The treatment of it is comprehensive and likely to be of practical use to the working barrister. How far it can be useful to treat the title of 'Air' apart from 'Light' and from the wider and comprehensive titles of 'Nuisance' and 'Prescription' may be open to question, but the object is expressed to be to discuss the right to air as a separate subject of enjoyment, and, in so far as that is established by the ruling cases referred to on the subject, it is a novel and, maybe, a convenient departure from the more ordinary system of arrangement.

We note that *Hollins v. Fowler*, which is the leading modern case on Conversion, is given under the title of 'Agency.' There is certainly no objection to this; but at the same time it appears to us that it will be necessary to include it also under the title of 'Conversion,' which would certainly be incomplete without it. Such, however, are the inevitable

difficulties of combining a selection of leading cases with a digest. We may add that the objection raised by us in a criticism on the first volume, that the American ruling cases have not been set out at length, is, as far as we can judge from the American point of view, answered and removed by the preface to the present volume, where it is stated that, for American purposes, a selection is already made in the American reports there mentioned, to which there are references in all the American notes in this series. But this is no answer to the English lawyer who wishes for specimens of the best American authorities. 'Ruling Cases' will, no doubt, be of great service to men unable to provide themselves with large libraries.

The Merchant Shipping Act, 1894. By THOMAS EDWARD SCRUTTON.
London: Wm. Clowes & Sons, Lim. 1894. 8vo. xlii and
753 pp. (30s.)

THIS work on the new Merchant Shipping Act is the first in the field that can be called a complete handbook to the Act. It has a respectable table of cases, smaller in size than we should have expected, but nevertheless, so far as we have tested it, complete, and containing all or nearly all the cases which throw light upon the construction of this intricate and lengthy Act. *Burrell v. Simpson*, 4 Sess. Ca. 4th ser. 177, is not amongst them, perhaps because it is a Scotch case; nor *Glyn, Mills & Co. v. East & West India Dock Co.* 7 App. Ca. 592, which throws some light upon secs. 492-494.

Mr. Scrutton has a terse and forcible method of explaining the effect of a decision; of this his note upon the *Hankow*, 4 P. D. 197 (p. 478), is an example. He also has strong views, which he expresses in similar language, upon the general character of the new Act as a specimen of modern legislation. The draftsman has not acquired 'a very clear grasp of the Acts' codified. The grammar is occasionally 'bad, even for an Act of Parliament.' The law relating to fishing-boats 'is not adapted to the understanding of fishermen.' The pilotage law was 'a disgrace to any civilized system of jurisprudence, and this Act has made it worse.' With the last criticism we entirely agree. It is impossible to ascertain from the pilotage Acts whether pilotage is made compulsory for the sake of the ships or for the sake of the pilots; and continual legislation upon a subject as to which the Legislature does not know its own mind is likely to result in absurdities. The upshot of Mr. Scrutton's criticism of the present state of Merchant Shipping law is that codification leads to amendment; perhaps this is one of its uses.

An important part of such a work as this is to give an easy mode of reference to the corresponding enactments in repealed statutes. This Mr. Scrutton does by appending to the marginal notes of the existing Act a reference to the Act and section or Order in Council which is reproduced. This serves the purpose; but a distinction, in type or otherwise, should have been made between the marginal notes themselves and the editor's references. Some of the Appendices seem wanting in notes. For instance, Article 10 of the Collision Regulations requires explanation by the light of subsequent Orders in Council. It would be too much to expect all the cases decided upon these Regulations to be cited, but the Regulations are scarcely intelligible without some of them; and none are given. On the other hand the cross-references in the notes to the body of the Act are very full. The value of the book can only be discovered by continual use. So far as we have tested it, Mr. Scrutton's work appears to have been well and thoroughly done. His printer should not, however, have altered the name of a great judge (p. 320) to Willis J.

The Merchant Shipping Act, 1894. By J. D. WHITE. London: Eyre & Spottiswoode. 1894. 8vo. xvi and 628 pp. (7s. 6d.)

THIS is the third book on the Merchant Shipping Act, 1894, that has come to our hands. It is small in bulk, though not in the number of its pages. There are notes following the sections to which they relate, referring to cases illustrating the text of the Act, but not much in the way of cross-references; nor do the notes indicate where the old law reproduced in the several sections of the new Act is to be found. The Index is somewhat scanty. Though not exhaustive from the point of view of the practitioner, the book probably contains all that business men and many lawyers require. The table of cases runs to fourteen pages and gives references to all the Reports.

A Treatise on the Law of Charterparties. By EUGENE LEGGETT. London: Stevens & Sons, Lim.; Calcutta and Bombay: Thacker & Co. 1894. 8vo. xlix, 662 and lxiii pp. (25s.)

MR. LEGGETT's industry in India has now added to the 800 and more pages he has devoted to Bills of Lading, 750 of the same description on Charterparties. If these very closely-allied documents cannot be dealt with satisfactorily in less than 1600 pages, we shall all have to extend our legal libraries very considerably, and re-write most of our text-books. The work before us is on the same lines as the work on Bills of Lading previously reviewed in these pages (L. Q. R. x. 89). The author still thinks 'Part I. The nature of a charterparty, and its legal incidents; Part II. The legal effect of the clauses and stipulations in the charterparty; Part III. Exceptions,' a scientific and convenient division. He still cites judgments at great length and without much appreciation of their meaning, stringing them together with inadequate general propositions. He still suffers from incapacity to frame a short or intelligible definition; witness the twenty-four lines on page 2, which are by courtesy to be considered a definition of a charterparty, and compare them with the two short statutory definitions on the opposite page. When there is a difficulty not apparent on the face of the reports he usually overlooks it. Thus on page 508, the short and simple statement is made that in lay days and demurrage days (the passage appears to apply to either, though the author does not seem to have appreciated that they might be different) a part of a day counts as a whole day. The Court of Appeal has just held in *The Katie* ('95, P. 56) that this is true for demurrage days, but not for lay days, in the absence of agreement, and the authorities before this had left the point open.

We should like to hear Mr. Leggett's views of what was supplied by his 1600 pages which was not given more thoroughly and usefully in say the 700 pages of Mr. Carver's 'Carriage by Sea.' The work has apparently been carelessly revised for press; at least we hope that this is the explanation of the passage on p. 634, making Willes J. and A. L. Smith J. members of the same Divisional Court; of several wrong references in the index; of the failure to note that *Laurie v. Douglas*, 15 M. & W. 746, has been doubted if not overruled in *The Accomac* (1890) 15 P. D. 208; and of the mysterious sentence on p. 524, beginning 'In bags of linseed, the Court held . . .'. More serious faults appear to be the very scanty mention of the statutory powers of the shipowner to preserve his lien under the Act of 1862, the importance of which has just been illustrated by the decision of the House of Lords in December, 1894, in *White v. Furness, Withy & Co.* ('95, A. C. 40). We are unable to commend the book as an example to young authors.

The Building Societies Acts, 1836, 1874, 1875, 1884, 1894. By J. RITCHIE MACOUN. London: Sweet & Maxwell, Lim. 1894. 8vo. xxviii and 183 pp. (5s.)

A NEW Act means new law-books, one or many. The Building Societies Act of last session has brought Mr. Macoun to the fore with a very useful manual which brings the six existing Acts into convenient focus. His plan is to cut up each Act into sections and paste all the sections together in what he conceives to be their proper order. We cannot altogether admire this method of scissordom, but granting the wisdom of Mr. Macoun's policy, his execution is admirable. It would have been better if he had given a full table of contents, which would have gone far to illustrate his arrangement of sections. And the effect produced by reproducing the preambles and initial sections of the six Acts consecutively is certainly peculiar. The work, however, which Mr. Macoun has done is thoroughly painstaking and good. Every case is cited, and fully cited. And the introduction which Mr. Macoun has written upon the development of building societies is admirably lucid and pertinent. The book will unquestionably be useful alike to lawyers and to laymen. It will be particularly well placed in the hands of the officials who govern building societies. For it is upon their fulfilling their trusts conscientiously that the welfare of a society depends. It is when they ignore or betray their trusteeship that failure or disaster comes. With Mr. Macoun's help they may avoid many legal difficulties, and see at any rate when there is occasion to ask for legal advice.

The Law relating to Children and Young Persons. By JOSEPH BRIDGES MATTHEWS. London: Sweet & Maxwell. 1895. 8vo. xvii and 400 pp. (10s. 6d.)

THE author has performed a useful task in bringing together in the present volume the various statutes and portions of statutes relating to children and young persons. The Prevention of Cruelty to Children Act of 1894 is treated as the principal enactment in this branch of the law, and is annotated chiefly by references to other relevant Acts; but apart from this, little attempt is made to analyze or group the different statutes, or to deal critically with such difficulties as the text presents. Moreover, in raising so many queries to which no answers are vouchsafed (e.g. on p. 127), the author does not add much to the elucidation of obscure points of law. The book excludes much that relates to 'Infants' in the technical sense of the word, and it was no doubt a wise decision to avoid all comment on the Infants Relief Act, 1874, which applies mainly to children of a larger growth, rather than deal with it inadequately. To those persons who are interested in setting in motion the laws for the protection of children and young persons generally, even more than to the practitioner, the present handy volume, which contains a mass of information drawn from the most various sources, will be of considerable service. The case of *Scarman v. Castell* (1 Esp. 270) mentioned at page 80, fails to appear in the list of cases cited.

The Law of Eminent Domain in the United States. By CARMAN F. RANDOLPH. Boston: Little, Brown & Co. 1894. La. 8vo. cxxv and 462 pp.

THIS latest contribution to the law of Eminent Domain in the United States is a striking illustration of the growing tendency to make text-books

mere digests of all reported cases without regard to the merit or authority of the decisions. There are about four thousand citations of cases in the four hundred pages of text, though some of them are cited more than once. The work would be more valuable if it contained a better statement of the well-considered and authoritative decisions.

The distinction between the police power and the right of eminent domain is well stated and illustrated. The recent decisions are carefully collected and their effect stated with substantial accuracy. The book is a useful addition to the previous discussions of a branch of the law which has become of very great practical importance in the United States.

We have also received :—

The Elements of Jurisprudence. By THOMAS ERSKINE HOLLAND, D.C.L. Seventh Edition. Oxford: Clarendon Press. 8vo. xx and 402 pp. (10s. 6d.)—Prof. Holland has so often revised the substance of this standard work that he was well entitled to confine himself this time, as the brevity of the new preface suggests that he has, to 'posting up.' We should almost prefer the book to be called 'Institutes of Law,' for it deserves that title better than any modern book we know. Criticism is hardly called for, but we may point out that Mr. W. A. Hunter was not at all the first writer, though he was the first in England after Maine had made Savigny's historical theory of the Stipulation popular, to show cause against that theory (p. 244); and that the language used about warranties on p. 210, though a trained lawyer will read it as qualified by the context, might possibly lead a beginner to think that the operation of a warranty *ex contractu* has something to do with the warrantor's state of good faith or otherwise.

A Digest of the Criminal Law. By the late SIR JAMES FITZJAMES STEPHEN. Fifth Edition. By SIR HERBERT STEPHEN and H. L. STEPHEN. London: Macmillan & Co. 1894. 8vo. xlvii and 488 pp. (16s.)—It was time that Sir James Stephen's Digest of the Criminal Law, which may now be called the classical text-book of the subject, should be brought down to date. The eminent author's sons have done this with all due piety and discretion. They have probably been wise in not touching the notes in the appendix. But perhaps a few references to later literature, besides the necessary decisions and statutes, might have been added. For example, there has been some discussion, both judicial and extra-judicial, of what is meant by 'possession' in English law, since the note on 'Possession in relation to the law of larceny' was last revised by Sir James Stephen.

Commentaries on the Law of Persons and Personal Property: being an introduction to the study of Contracts. By THEODORE W. DWIGHT. Edited by EDWARD F. DWIGHT. Boston: Little, Brown & Co. 1894. La. 8vo. lxii and 748 pp.—We have not been able to make an adequate examination of this posthumous monument of the late Prof. Dwight's labours. It obviously contains much excellent learning, and English lawyers who have occasion to satisfy themselves how far doctrines of the Common Law continue to be received in the United States in the same sense as here may well find it of practical use. There are signs of the author's last revision not having been given, and we think the editor's natural piety has made him a little too timid. He might have safely ventured to put the United States Copyright Act of 1891 into the text, rather than stow it away in a foot-note. The title has to be read very literally, for the subject of Contracts is not reached.

Footpaths and Commons, and Parish and District Councils. By SIR ROBERT HUNTER. London: Cassell & Co. 1895. 8vo. 32 pp.—We hope this little handbook will be widely known and used. Public rights have often been lost for want of taking the proper steps in time, and in the absence of competent advice nothing is easier than to turn a good case of this kind into a bad one by injudicious proceedings. There could not be a better qualified guide to the subject than Sir Robert Hunter. One minute criticism: in citing the Law Reports from 1875 onwards it is wrong to prefix 'L. R.'

The Student's Guide to the Bar. By W. W. ROUSE BALL. Sixth Edition. By JOHN P. BATE. London: Macmillan & Co. 1895. Sm. 8vo. 60 pp. (2s. 6d.)—This is a sensible and practical handbook, already well tested. The only criticism that occurs to us is that now and then it seems to be addressed almost exclusively to University men. Surely the Inns of Court student who has not been at any of the Universities, and to whom explanations of the Inns and their ways by the analogy of colleges is only *obscurum per obscurius*, is of the kind most in need of guidance.

Every Man's own Lawyer. By a Barrister. Thirty-second Edition. London: Crosby Lockwood & Son. 1895. 8vo. xvi and 736 pp. (6s. 8d.)—This book aims at being 'an absolute necessity for every Englishman who desires to have some acquaintance with the laws of his country'; and this edition has the new feature of a dictionary of legal terms. The definitions may be found in the main sufficient for the wants of lay people, but such as those of 'civil law,' 'consideration,' 'damage feasant' (too narrow), 'fealty' (not confined to freeholders as supposed), 'folk-land' (out of date since Vinogradoff restored Spelman's explanation), 'manor' (freehold tenants ignored), 'peine forte et dure' (quite inaccurate), 'seisin,' 'socage' (not distinguished from military tenure), 'trespass' (much too wide), 'wapentake' (no more 'a term for the hundred' than Yorkshire is a term for Devonshire), will not satisfy lawyers and scholars. Of the general utility of such a book lawyers are perhaps the worst possible judges. We observe, however, that recent cases have been noted up to an extent, and in a manner, that seem at first sight more appropriate to a text-book for law students than to a popular exposition.

Briefless Ballads and Legal Lyrics. Second Series. By JAMES WILLIAMS. London: A. & C. Black. 1895. 8vo. 96 pp.—We have no space for despicience in this REVIEW, though we count it an excellent thing in its place; and therefore we can only say 'privily' to our learned readers (as the judges are now and then reported in the Year Books to have relieved their feelings in asides to counsel) that Mr. Williams's trifles will be found melodious and entertaining. But we must point out that John Doe was not usually the casual ejector in an action of ejectment. That even more shadowy person dropped out of the action at an early stage to make way for the real defendant. Also it is no more the custom of judges to spit in (or indeed out of) court in Massachusetts than in England (see p. 77).

Riccardo Malombra, professore nello studio di Padova, consultore di stato in Venezia. Ricerche di ENRICO BESTA, studente nella Università di Padova. Venezia, 1894. La. 8vo. 184 pp.—A work of academic piety, being a monograph on the fourteenth-century publicist Malombra, sometime a professor at the writer's university. Several of Malombra's opinions are set out, and ought to be interesting to students of mediaeval civil law. The performance has every appearance of being competent and scholarly.

Ruling Cases. Edited by R. CAMPBELL. Vol. III. Ancient Light—Banker. London: Stevens & Sons, Lim.; Boston, Mass.: The Boston Book Co. 1895. La. 8vo. xxvii and 779 pp. (25s. net.)

A Collection of Statutes relating to Criminal Law. Reprinted from the fifth edition (by J. M. LELY) of Chitty's *Statutes of Practical Utility*. With an Introduction and Index by W. F. CRAIGES. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1894. La. 8vo. xxxvi, 429 and 33 pp.

Eight Hours for Work. By JOHN RAE. London: Macmillan & Co. 1894. 8vo. xii and 340 pp. (4s. 6d.)

The Unemployed. By GEOFFREY DRAGE. London: Macmillan & Co. 1894. 8vo. xiv and 277 pp. (3s. 6d.)

A Handy Book of the Labour Laws. By GEORGE HOWELL, M.P. Third Edition, revised. London: Macmillan & Co. 1895. 8vo. xii and 338 pp.

The Merchant Shipping Act, 1894, with an Introduction, Notes, including all cases decided under the former Enactments consolidated in this Act, a comparative Table of Sections of the former and present Acts, an Appendix of Rules, Regulations, Forms, &c., and a copious Index. By ROBERT TEMPERLEY. London: Stevens & Sons, Lim. 1895. La. 8vo. lxxx and 714 pp. (25s.)

Bateman's Law of Auctions. Seventh Edition. By PATRICK F. EVANS. London: Sweet & Maxwell, Lim.; F. P. Wilson. 1895. 12mo. xl and 595 pp. (12s.)

A Dictionary of Crimes and Offences according to the Law of Scotland. By JOHN W. ANGUS. Revised by R. B. SHEARER. Edinburgh: W. Green & Sons. 1895. 12mo. 538 pp.

The Law of Torts. By SIR FREDERICK POLLOCK. Fourth Edition. London: Stevens & Sons, Lim. 1895. 8vo. xl and 636 pp. (21s.)

La Codification du droit international de la faillite. Par D. JOSEPHUS JITTA. La Haye: Belinfante Frères. 1895. La. 8vo. xvi and 342 pp.

The Law relating to Income Tax. By ARTHUR ROBINSON. London: Stevens & Sons, Lim. La. 8vo. xlix and 508 pp. (21s.)

The Annual Digest, 1894. By JOHN MEWS. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1895. La. 8vo. xl and 17 pp., 352 columns. (15s.)

The Merchant Shipping Act, 1894 . . . being a supplement to Kay's *Law relating to Shipmasters and Seamen*. By the Hon. J. W. MANSFIELD and G. W. DUNCAN. London: Stephens & Haynes. 1895. La. 8vo. viii and 415 pp.

*The Editor cannot undertake the return or safe custody of MSS.
sent to him without previous communication.*

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NOTES.

THE case of *Toulmin v. Steere* (1817, 3 Mer. 210, 17 R. R. 67) has had a chequered career. There Sir William Grant enforced the doctrine that if a mortgagee purchase an estate subject to another but subsequent mortgage, and the purchaser's mortgage debt be paid off out of the purchase money, the subsequent mortgage becomes a first charge on the estate, and the purchaser cannot afterwards set up his extinguished mortgage against the subsequent mortgagee. The result is that the latter gains great advantage by a transaction to which he is not a party and at the expense of the purchaser, who is under no liability to pay him. We know that in *Gregg v. Arrott* (Ll. & Goo. 251) Lord St. Leonards said that both he and Sir S. Romilly, who were counsel in *Toulmin v. Steere*, thought 'at the time' that the decision was wrong. The case has often been cited, and Sir George Turner is almost the only judge who has regarded the decision with favour (*Squire v. Ford* (1851), 9 Hare, 60). Careful conveyancers exclude the operation of the rule by the insertion in the deed of a provision that the debt that is paid off and extinguished shall be considered to be kept alive as a protection against mesne incumbrances. Modern decisions show that the courts will not apply the doctrine of *Toulmin v. Steere* if, in the absence of an express provision in the deed, the circumstances surrounding the execution of the deed show that it was the intention of the parties that the debt, which is paid off, should be kept alive (*Adams v. Angell* (1877), 5 Ch. D. 634; *re Pride*, '91, 2 Ch. 135). It is to be regretted that the law lords did not avail themselves of a late opportunity of overruling *Toulmin v. Steere*. In *Thorne v. Cann* ('95, A. C. 11, 64 L. J. Ch. 1) that case came for the first time before the House of Lords. Lord Herschell said, '*Toulmin v. Steere* is a case which certainly has not met with universal acceptance: it has been often commented upon and criticized adversely. It appears that an appeal was contemplated though circumstances rendered it unnecessary.' Lord Watson spoke of 'the very doubtful authority of the rule laid down in *Toulmin v. Steere*'; and Lord Macnaghten added, 'The authority of that case cannot

nowadays be treated as going beyond the actual decision.' It is almost inconceivable that the doctrine of *Toulmin v. Steere* should operate without working actual injustice, and since the House of Lords has stopped short of overruling it, conveyancers will still have to insert in their drafts the ugly and apparently inconsistent provision excluding its operation.

An action for, or in the nature of, slander of title will not lie unless the statement complained of is false, and false to the knowledge of the defendant, and has caused actual damage. Mere puffing of one's own wares in comparison with a rival's will not give him a cause of action if all these conditions are not satisfied. This is really well-settled law, but the peculiar turn taken by the evidence, and the shifting of ground during the argument, seem to have disguised it even in the eyes of the Court of Appeal in *Mellin v. White*, where it is now clearly affirmed by the House of Lords, '95, A. C. 154, 64 L. J. Ch. 308.

Income tax is chargeable under Schedule (D) on the annual profits or gains, or, in other words, the income, arising from a trade being 'carried on or exercised in the United Kingdom,' and this, be it noted, whether the person carrying on or exercising the trade is a British subject or an alien.

For the determination then of the question how far the income resulting from a trade is liable to income tax, the courts are often required to decide whether it is or is not 'carried on or exercised in the United Kingdom.'

San Paulo Railway Co. v. Carter, '95, 1 Q. B. (C. A.) 580, 64 L. J. Q. B. 379, is the latest of a long line of cases, beginning in 1859 with *Att.-Gen. v. Sulley*, 4 H. & N. 769, which more or less define the circumstances under which a trade can be said to be carried on or exercised in the United Kingdom. The result of the decisions is curious and a little startling. A trade, it will be found, is 'carried on or exercised in the United Kingdom' in at least two quite different cases.

First case—A trade is carried on in the United Kingdom when the ultimate management, or the centre and control, of the business is placed in the United Kingdom, or in other words when the management of the business as a whole is placed in the hands of persons who reside or have their head office in the United Kingdom.

When this is the case the whole business is carried on in the United Kingdom even though the transactions (e.g. sales) from which profits arise take place mainly or even wholly outside the United Kingdom. (See *Cesena Sulphur Co. v. Nicholson*, 1 Ex. D. 428, 452, 454, judgment of Huddleston B.; *Imperial Continental Gas Association v. Nicholson*, 37 L. T. 717; *London Bank of Mexico v. Apthorpe*,

'91, 2 Q. B. (C. A.) 378, 60 L. J. Q. B. 653; *San Paulo Ry. Co. v. Carter*, '95, 1 Q. B. (C. A.) 580.)

Second case—A trade or business is carried on or exercised in the United Kingdom when or in so far as any material part of the transactions (e. g. sales) by which profits are earned takes place in the United Kingdom, and this holds good even though the ultimate management or the central point of the trade is placed in a foreign country. (See *Erichsen v. Last*, 8 Q. B. Div. 414; *Tischler v. Aphorpe*, 52 L. T. N. S. 814; *Pommery v. Aphorpe*, 56 L. J. Q. B. 155; *Werle v. Colquhoun*, 20 Q. B. Div. 753.)

Hence an extraordinarily wide extension of the operation of the Income Tax Acts. If *X & Co.*, an English company managing their business in England, make profits from the sale, e. g. of gas, which is manufactured and sold wholly in France, the whole income of the company is chargeable with income tax because the trade is 'carried on in the United Kingdom.' But if, on the other hand, *X & Co.* are a French company, makers and sellers of champagne, managing their business in France but making profit from sales of champagne in England, then every penny of profit thus made is chargeable with income tax as profits of a trade exercised in England. It is true, of course, that in the first case the whole income of the business is taxed, whilst in the second case only that part of the income is chargeable which results from English transactions. But it will be found when the matter is carefully looked into, that the principle of taxation is in each instance the same. The whole of the profits resulting from the trade being carried on in the United Kingdom are taxed; the only difference is that where the centre of the trade is in the United Kingdom, the whole trade is carried on, i. e. managed there, and as the whole of the profits result from such management the whole are taxed; whilst in the second case a part only of the trade is carried on or exercised, i. e. results from sales in the United Kingdom, and as a part only of the profits results from such carrying on, a part only is taxed.

This is the state of the law arising from the interpretation placed by the courts on Schedule (D), but the cases on which this interpretation rests have none of them come before the House of Lords.

Can the interpretation placed on Schedule (D) by the courts permanently stand? The answer admits of doubt. If we had no judicial decisions to guide us we should naturally come to the conclusion that one of the two senses given to the words 'carried on or exercised' ought to exclude the other. If *A* is held to carry on a trade in the United Kingdom because he manages it in London, though every penny of profit he makes arises from transactions

taking place in France, it would seem that *B*, who manages a trade at Paris, ought to be held to carry it on in France, even though some of the gains thereof result from transactions taking place in the United Kingdom, or that if *B* is held to carry on a trade in the United Kingdom, then that *A* ought to be held to carry on his trade not in the United Kingdom but in France. The double sense given to the expression 'carry on or exercise' sometimes perplexes the judges, and must presumably cause discontent in foreign countries. Until at any rate some case which in its circumstances resembles *Werle v. Colquhoun* is carried to the House of Lords, it must remain doubtful whether the courts have not given too wide an effect to Schedule (D) as far as regards the carrying on or exercise of a trade in a foreign country. It is of course arguable that a distinction is to be made between the term 'carried on' which occurs in the first paragraph, and the word 'exercised' which occurs in the second paragraph of Schedule (D). But this point, though arguable, is hardly tenable.

A careful study of the schedules of the Income Tax Act, 1853, the enactments connected therewith, as for example the Income Tax Act, 1842, s. 100, and the decisions on these schedules leads to a result which is apt to escape notice; the 'limit of taxation,' if the expression may be allowed, under the various schedules of the Income Tax Acts is, speaking broadly, and subject to some slight limitations, fixed by three principles, none of which appear *totidem verbis* in the Income Tax Acts.

First—Income tax is payable in respect of income accruing to any person, whatever his nationality, domicile, or residence, from a British source, or in other words from property or transactions in the United Kingdom.

Secondly—Income tax is payable in respect of the actual sums annually received in the United Kingdom out of an income accruing to any person resident in the United Kingdom from a foreign source. (Compare Schedule (D) and Income Tax Act, 1842, 3rd Rule, 4th Case and 5th Case.)

Thirdly—Income tax is not payable on any income which is not taxable under one or other of the foregoing principles. (*Colquhoun v. Brooks*, 14 App. Cas. 493, 59 L. J. Q. B. 53; *Bartholomay Brewing Co. v. Wyatt*, and *Nobel Dynamite Co. v. Wyatt*, '93, 2 Q. B. 499.)

'Treat your enemy as a possible friend and your friend as a possible enemy,' says Rochefoucauld, and the moral of *Trego v. Hunt* ('95, 1 Ch. (C.A.) 462, 64 L. J. Ch. 392) is the same. Treat your partner as a possible enemy, a rival in futuro. You will be entitled when the partnership expires to compete with your present

partners. Anticipate events and make a list now of the customers of the firm, so that you may solicit them successfully when the partnership is dissolved. This logic is unimpeachable. A partner has this prospective right according to *Pearson v. Pearson* (27 Ch. D. 145). Yet even as a matter of hard law such forearming might well be deemed at variance with the fundamental principle—the mutual trust and good faith—on which the contract of partnership is based. The Court of Appeal has preferred to adopt a strictly commercial view, suited to an age of ‘economists and of calculators.’ There is a borderland between law and morals expressed in the maxim ‘Non omne quod licet honestum est,’ and this case falls within it. It belongs to the domain of sentiment rather than logic. It is lawful for a man to marry again when his wife is dead, but we do not like a man to begin courting a second wife when he knows his first has only a year or so to live. The Court of Appeal has not been unanimous on this subject, and it remains to be seen whether the House of Lords may not ultimately restore the authority of *Labouchere v. Dawson*, L. R. 13 Eq. 322, which for the present is overruled.

Chilton v. Progress Printing and Publishing Co., '95, 2 Ch. (C. A.) 29, is a wholesome check to the attempts made from time to time to pervert the Copyright Acts to the purpose of creating a monopoly in bare facts or opinions as distinguished from works of literature or art. The framers of the Copyright Acts might have expressed their intentions better on various points, but the Court of Appeal had no difficulty in seeing that they did not intend to protect sporting tipsters.

An Act of Parliament can do much. Sir Thomas More thought it could not make a king the head of the church, but it can make a horse mean a cow and a single woman mean a widow or a wife (*R. v. Pilkington*, 2 E. & B. 546). It can also bind a creditor by a scheme of arrangement in bankruptcy, though he gets no benefit, no dividend out of the scheme (*Seaton v. Lord Deerhurst*, '95, 1 Q. B. (C. A.) 853). Here is the solution of the puzzle. Captain Pluck has a judgment. His debtor, Pigeon, goes bankrupt. Pluck assents to a scheme and tenders a proof for his judgment. The trustee of the scheme goes behind the judgment, finds it founded on a gambling debt, and disallows the proof. Poor Pluck has no remedy. His debt is a ‘debt proveable in the bankruptcy.’ In going behind judgments, in disallowing capitalized interest (Bankruptcy Act, 1890, s. 23), and in many other ways the court in bankruptcy is constantly exercising a very enlarged equitable jurisdiction, directed to secure the distribution of the estate among the bona fide creditors, to

frustrate knavish tricks and prevent plunder, and such is unregenerate human nature where insolvency is concerned, that the court has moreover to be always on the alert to see that its process is not being abused. *In Re Otway* ('95, 1 Q. B. (C. A.) 812) is an instance: where a debtor had a life interest of £1500 a year defeasible on bankruptcy. Here was a golden opportunity to squeeze the debtor by a petition. But the Court of Appeal unmasked the plotter. Such a petition is on the face of it futile, for a receiving order would annihilate all the assets.

Whether selfishness is, as Hobbes holds, the mainspring of human action or not, self-interest is an unfailing and thoroughly reliable quality in human nature, except in the case of some anomalous beings like Shelley or Samuel Taylor Coleridge, and the Court of Appeal has recognized it as such in *In re Cliff, Edwards v. Brown* ('95, 2 Ch. (C. A.) 21, 64 L. J. Ch. 423). Lacking this prospect, 'Victoria by the grace of God' may threaten or command the Englishman abroad—the awful mandate goes into the waste-paper basket with begging letters and company prospectuses; but drop a hint of something to be gained or possibly lost in administration proceedings here, and the absent beneficiary may be safely trusted to appear on the scene 'with wings as swift as meditation or the thoughts of love.' And this intimation can just as well be conveyed by a solicitor's letter without the leave of the court as with it. The wisdom of the legislature has in O. 11 carefully defined the cases in which leave to serve a person out of the jurisdiction may be given. An originating summons is not among them. It is designedly excluded, and the court cannot consistently with its self-respect purport to give a leave which it has no jurisdiction to give.

The Court of Appeal has now in *Broderip v. Salomon* (11 Times Reports, 238) declared all 'one man companies' to be an abuse of the Companies Acts. Nothing short of the mystic seven will do, and the seven must be 'all honourable men,' bona fide traders—none of them dummies. It is certainly unfortunate that this discovery as to the policy of the Companies Acts was not made earlier, for out of the thousands of private companies which have been formed in the last quarter of a century under the Companies Acts, it may be doubted if there are 10 per cent. which will satisfy the new test. The typical private company is a firm which has turned itself into a company, and in such a case the only real traders are the two or three partners. The rest are the requisite dummies. *Broderip v. Salomon* leaves these companies with a very questionable status, which is to be regretted. As to the sham company, the

company which is the mere *alter ego* of a promoter, there is no harm in holding it a trustee for its promoter, and very little good either, because, as Vaughan Williams J. has lately decided in *In re Carey* (Sol. J., Apr. 20), the company's creditors must first be paid in full, which, of course, leaves nothing for the promoter's creditors. The anomaly is that the one man company, sham or not, is in every formal respect a perfect company (*In re George Newman & Co.*, '95, 1 Ch. (C. A.) 674, 64 L. J. Ch. 407), liable possibly to be disincorporated, but in the meanwhile unassailable. The only way in which the views of the Court of Appeal in *Broderip v. Salomon* could be given effect to would be by an inquisitorial investigation by the Registrar of Joint Stock Companies on the application to register a company—an investigation which he has at present no power to make, if everything is *ex facie* regular.

In our overcrowded civilization some people may have misgivings whether public policy is after all so much in favour of marriage. Such cynics will find no encouragement at present (*Morley v. Renoldson*, '95, 1 Ch. (C. A.) 449). Marriage is still as much a duty of perpetual obligation as when Wilmot C.J. called celibacy a 'weed of the canon law' and 'the greatest of all political sins' as tending to depopulation. True in *In re Abdy* ('95, 1 Ch. (C. A.) 455) the holy estate of matrimony appears at some disadvantage as compared with the condition of concubinage, but it is only at first sight. Where husband and wife agree to separate and then come together again the covenants of the separation deed come to an end *cessante ratione*; but this does not apply to covenants in such a deed in favour of a concubine, which is based on an entirely different consideration. Hers are not the rights of a lawful wife, which revive on recohabitation, but the precarious tenure of a mistress. The covenant to pay an annuity in reality represents agreed damages for personal and social disparagement.

Sir Walter Scott was once at an evening party, listening with delight to a ballad being sung. He asked one who stood by him who was the writer of those beautiful lines, and he was told that they were—his own. Others have believed themselves the authors of what they have not written. As Prior says:

'The happy whimsy you pursue
Till you at length believe it true.
Caught by your own delusive art,
You fancy first and then assert.'

A strange phantasmagoria is this mind of ours! and well it is that the *littera scripta* does remain to correct the 'frail testimony of memory' and the kaleidoscopic changes of thought and feeling.

Kekewich J., reflecting on these things, has arrived at the very just conclusion that the court must exercise great caution when invited to reform a voluntary settlement to suit the present views of the settlor as to what he thought he meant. The parol evidence ought in such a case to be of the clearest; in *Bonhote v. Henderson* ('95, 1 Ch. 742, affirmed '95, 2 Ch. 202) it was of the flimsiest. The truth is that in these ulterior limitations under voluntary settlements, whether by deed *inter vivos* or by will, where there is no bargaining the mind of the settlor is seldom really brought to bear on the contingency. It is only when the event has happened that the settlor begins to think about what he meant to do or thought he meant to do.

Kelly v. Metropolitan Ry. Co., '95, 1 Q. B. 944, is an important supplement to *Taylor v. Manchester, Sheffield, & Lincolnshire Ry. Co.*, '95, 1 Q. B. 134, 64 L. J. Q. B. 6. Both decisions were in the Court of Appeal, and the result seems to be that the breach of a distinct duty to use reasonable care may always be treated as a tort, whether or not it is also a breach of contract, and whether the specific negligence complained of consisted in a positive misfeasance or in an omission. This last point is now covered by *Kelly's* case, where the negligence was an engine-driver's omission to shut off steam in due time. After these decisions it seems impossible to maintain the authority of *Alton v. Midland Ry. Co.*, 19 C. B. N. S. 213, 34 L. J. C. P. 292, although a considered judgment of the late Mr. Justice Willes is not lightly to be dissented from. What the Court of Appeal have now done is really to restore the view which prevails in all the earlier authorities, and which underlay the action of *assumpsit* itself. The framers of the County Courts Act no doubt supposed the distinction between actions founded on contract and actions founded on tort to be plain and exhaustive; a little more knowledge of the history of the law would have saved much litigation.

Lord Bramwell was fond of describing a railway company as '*caput lupinum*.' In *Great Northern Railway v. Palmer* ('95, 1 Q. B. 862), if the railway company figures as a wolf, the passenger figures as the lamb. For what does it come to? Viator, as old Isaac Walton would say, finds an excursion train advertised to run from London to York. Viator has friends living a few miles out of York, and he thinks he will seize the opportunity to pay them a visit. So he takes an excursion ticket and goes on to the next station beyond York, where his friends live, paying or tendering the extra fare. For this it appears the railway company is entitled to forfeit the ticket under the conditions of issue as having been used for a station 'other than that named on it.' Why does not the railway company go

a step further and see that the cheap tripper is kept strictly to excursionist business—his eight hours' lounge on the beach, his bathing machine, swing or roundabout, and the usual allowance of sea-sickness at 1s. 6d. an hour, and forfeit him for any 'deviation'? Granted the correctness of the decision on the technical point of law, what folly is this! what 'pettifogging, short-sighted, and vexatious policy on the part of a great railway company, whose aim should be to consult the convenience of the public and encourage the traveller!

An execution creditor is very much like a dog with a bone, and he may well begin to growl, metaphorically speaking, at being meddled with by debenture-holders. The floating debenture permits the company to deal with the property charged in the ordinary course of the company's business. The company may sell it, or mortgage it, or charge it. Given this free hand, the company goes on and contracts debts, the unpaid creditor levies execution, and then the debenture-holders, who have been lurking in ambush all the time, start up like Roderick Dhu's 'plaided warriors arm'd for strife,' and remorselessly say to the execution creditor, 'Hand over to me the fruits of your execution. That property is mine.' This is a genuine grievance. Practically it means that creditors of a company which has issued debentures can never levy execution because when executions begin a company is water-logged, if not sinking. In *Robson v. Smith* ('95, 2 Ch. 119) Romer J. has indeed held that a floating debenture-holder cannot lay hands on a debt of the company which has been attached by a creditor if the company is not in winding-up or a receiver appointed. This is a crumb of comfort, but debenture-holders are rapidly filling up their 'cup.'

The Roman augurs, we know, could not look in one another's faces without a smile, and there are some matters in which English lawyers, too, exchange glances of mutual intelligence about their mysteries. The common law doctrine of accord and satisfaction—for instance, that a creditor may accept a canary or a tomtit, anything in short in satisfaction of his debt except a less amount of money—is one which it is difficult to explain to the satisfaction of the intelligent layman as an emanation from the 'perfection of human reason.' Similarly, to the uninitiated the mysterious efficacy attaching to the word 'demise' is puzzling: why it should carry a covenant for title and a covenant for quiet possession, while the simple 'let' carries only a qualified covenant for quiet possession. But so it is (*Baynes v. Lloyd*, '95, 1 Q. B. 820). Demise is in fact a legal fossil—one of the few words still left with a peculiar legal connotation. Substance happily now prevails over form, and

a man's rights do not depend on the right use of such words as 'grant' or 'estate' any more than on a stop or a comma. Any phraseology is enough if it clearly indicates intention. *General Assurance Co. v. Worsley* (15 R. (May) 357) is an illustration deciding that a notice to determine a tenancy, though imperfectly expressed, is a good and valid notice if treated as such by the parties.

An agreement by the master of a vessel in distress to pay a specified sum to another vessel for towing his own to a place of safety does not exclude the salvor's right, independent of contract, to some remuneration for the service he actually succeeds in performing, even if it falls far short of entitling him to the payment agreed upon: *The Hestia*, '95, 1 P. 193. Would a term in the agreement whereby the salvor undertook not to claim anything under the general law of salvage be upheld, or disallowed on grounds of public policy? The case suggests this further question but gives no hint for its solution.

In most contentious litigation ideal justice lies somewhere between the claims of the litigants, and is best satisfied by a compromise: only the litigants themselves do not think so. "Budge not!" says the fiend; and if counsel advises a compromise however advantageous, he is generally thought by his client to have given the less friendly counsel, if not to have given the client away altogether. To advocate a compromise doth compromise an advocate. *Kempshall v. Holland* (14 R. (May) 296) is useful in drawing attention to the fact that counsel's authority to compromise is not one at large. It is confined to matters in question in the action. This is good so far as it diminishes the responsibility of counsel, but there is an inconvenience attending such limited authority, as the case itself illustrates. For if one of the terms is outside the scope of the action, a perverse client may undo the compromise, as she—of course she—did in *Kempshall v. Holland*.

Prof. Maitland communicates this curious gloss from a Bracton MS. (Camb. Univ. Dd. vii. 6): 'Et nota quod de iure naturali minus curatur in Anglia quam in aliqua regione in mundo, quia Rex Anglie vocatur Dominus Marium.' This shows that the law of nations was already regarded as a branch of the law of nature, and is a very early testimony to the growth of the English king's claim to a lordship over the sea. It seems to have been written about 1327.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

PETTY PERJURY.

THE wisdom of our ancestors drew a distinction between petty larceny and grand larceny. I wish the wisdom of our modern legislators could see its way to draw a similar distinction between petty perjury and grand perjury. Theoretically and theologically all perjuries constitute one and the same offence, and this is the present view of English law. If one man wilfully and corruptly swears away the life of another in a murder trial, and another man wilfully and corruptly swears that he has repaid a loan of twopence in a county court case, each of them alike is guilty of perjury, and each of them is liable to the same punishment. But every one must feel that the two offences differ in kind as well as in degree. Perjury, after all, is merely a means to an end, and one cannot help regarding the end in view as well as the means used to obtain it. But then comes the difficulty: What line can be drawn between trivial and serious perjury? All perjury in criminal proceedings is evidently of a serious nature, but in civil cases the pecuniary amount involved offers no certain test. Take the common case of the plaintiff suing for a small debt. The defendant says that he has paid the debt, and produces a receipt. The plaintiff thereupon swears that the receipt has been forged or altered. If the plaintiff is swearing falsely he is making a serious criminal charge against the defendant. But I submit that the difficulty might be got over by leaving the matter to the discretion of the court before which the perjury was committed. *Prima facie* no doubt all perjury should be regarded as a serious crime; but it might be left to the court before which the offence was committed to say that it should be prosecuted and dealt with as a petty offence. There is at present a Bill before Parliament to consolidate and amend the law relating to perjury and cognate offences. The Bill deals in the first place with perjury, that is to say, false swearing in a judicial proceeding; in the second place, with false sworn declarations; and in the third place with false statements, made under statutory authority, but not under oath and not for use in any judicial proceeding. The last offence may be dealt with by a court of summary jurisdiction, unless the accused desires to have the case tried by a jury. In that event the case is to be sent to the Quarter Sessions. It seems to me that most county court perjury could be efficiently dealt with

if it were dealt with on the same lines as a false statement. What is required is a small punishment promptly inflicted. When the Bill was before the Lords Select Committee last year, I attended before the Committee and urged this view, but without success. The alteration in the law which I suggested was probably too great a change to be introduced in a Bill which is substantially a consolidation Bill. But I hope in some form, and at some future time, the subject of petty perjury will receive the attention of the Legislature. Most county court and police court perjury is a mean, petty, contemptible offence, which should be met with a small contemptuous punishment. Our ancestors would have found no difficulty in awarding such punishment. But the days of the stocks and the ducking-stool are gone for ever. Though the bulk of petty perjury could be effectually stopped by putting the offender under a pump and ducking him well, or simply painting his nose pea green, such methods are no longer within practical politics. The point I wish seriously to insist on is that, in the case of a crime like perjury, the certainty of punishment is far more important than its severity. The probability of getting fourteen days' hard labour within a week's time at the nearest police court would be far more deterrent than the bare possibility of a long sentence at the next Assizes.

It has been suggested that the court before which perjury is committed should have the power of punishing it there and then as a contempt of court. I think there are the strongest objections to this suggestion. In the first place there is a good deal of human nature in most judges, and a judge is naturally annoyed when he discovers an attempt to deceive him and to make him do injustice in the case he is trying. But punishment should not be awarded by a judge who can have any personal feeling in the matter. Again, it is a great safeguard to the accused to require the concurrence of two independent tribunals. If the judge who orders the prosecution and the tribunal which afterwards tries the case both come to the conclusion that perjury has been committed, there is little chance of injustice being done. In my own case I usually go further than this. When I think that perjury has been committed and can be proved, I order the case to be tried by a jury, and if the case comes out in the same way before the jury at the adjournment, I then send on the papers to the Public Prosecutor, asking him to form an independent opinion before taking proceedings. I am always loth to take advantage of perjury committed in a hurry. When a man finds himself cornered he is apt to blurt out the first lie that occurs to him. If the case is adjourned for trial by a jury at a future date, this gives him a proper *locus poenitentiae* which he

frequently avails himself of. If he deliberately repeats his false statements, his offence assumes a much graver character. For my own part, too, I recognize a wide distinction between the use of perjury as a weapon of offence and as a weapon of defence¹. In the latter case I should be very slow in ordering or suggesting a prosecution. For instance, in cases where prisoners are allowed to give evidence, or when a witness is cross-examined as to credit, I think there would be very few instances in which I should like to take the responsibility of directing criminal proceedings. Some time ago an artisan was sued before me on a draper's bill. His wife appeared for him. After telling various obvious lies, she at last came out with her real defence. 'If you give judgment against my husband, I shall get the stick.' In a somewhat similar case a solicitor asked me if I would direct proceedings against the woman for perjury, and I told him he might as well ask me to order the prosecution of a cat for mewing. Now to take a case on the other side of the line. The wife of the defendant appeared to defend an action for drapery goods. Among the goods supplied was a velvet cloak. I asked the woman what she meant by getting such an article when her husband's wages were only twenty-seven shillings a week. She replied that she 'did not owe for that.' I asked why. She thought for a minute, and then said, 'The plaintiff gave me the cloak because he indecently assaulted my little girl.' The plaintiff, who was a respectable tradesman and married man, danced with rage. But a little inquiry showed that the accusation was absurd. Now if I could have sent the woman straight before a magistrate who could have given her fourteen days' hard labour, it would have met the merits of the case; but it would have been absurd to order a solemn assize prosecution for a mere vicious feminine lie.

Though most of the perjury committed in county courts and police courts is of a petty nature, still in the aggregate it constitutes a serious impediment to the administration of justice. One cannot make bricks without straw; and where evidence is wholly untrustworthy, a judicial decision is mere guesswork. The judge has only probabilities and not testimony to guide him. Few people, I think, realize the extent to which perjury is prevalent among the lower classes in England. I happen to have administered justice in three different countries, namely, England, Gibraltar, and India, so perhaps I have some basis of comparison. In Gibraltar there was a mixed population of Spaniards, Maltese, and Barbary Jews, but there was

¹ Perhaps divorce proceedings best illustrate the distinction. An unfaithful wife who denies her guilt uses perjury as a weapon of defence, while the hired witness who falsely swears away the reputation of an innocent woman uses perjury as a weapon of offence.

nothing to complain of in the way of perjury. In India, no doubt, there was a good deal of lying, but many of the lies were of a stereotyped form (like fictitious averments in pleading), and I certainly think it is harder to get at the truth in an English county court than it was in a North-West cutcherry¹. In the High Court a higher grade of witnesses is reached, and perjury is comparatively rare. Moreover, a witness who will freely commit perjury in a money matter will hesitate to do so in a criminal cause. Wales has not a high reputation for truth-telling, but if I may judge from a single circuit, the Welshmen are no worse than their neighbours. With one exception, I was struck with the careful honesty of the witnesses all round the circuit. The exception unhappily is not peculiar to Wales. I refer to false charges under the Criminal Law Amendment Act, made by dirty little girls. Out of nine cases committed for trial, there was only one conviction, and I was satisfied that the acquittals were right. It is horrible to think of the misery that must have been endured by innocent men through the lies of these nasty little wretches. It would be well if the jury, in such cases, could add a rider to the verdict of 'Not guilty,' when they were satisfied that the charge was false and malicious. In such case the judge should probably be empowered to send the prosecutrix to a reformatory. The merits of the case would be still better met if the girl could be well whipped by a stalwart prison matron, but mawkish modern sentiment would be opposed to so sensible a procedure. Reverting now to the extent of county court perjury, some time ago I took a note of a hundred consecutive cases for less than £20 tried before me at Birmingham². I found there was hard cross-swearing in sixty-three. Of course there is much hard swearing which is not perjury. Memory is a treacherous faculty; and I think also that witnesses often talk over a case beforehand, and at last come to mistake what they have said or been told for what really happened. Again, in a running down case, truthful witnesses may often give diametrically opposite accounts of the accident. The fact is that no one's attention is called to what is passing until the accident happens, and the witnesses have to describe events they were not at the time attending to. My county court experience is mainly confined to Birmingham, but I have no reason to believe, and I do not believe, that Birmingham is worse than other large urban courts. If that be so, after making all allowance for hard swearing which is not perjury, there remains a terrible

¹ Ancient Hindu law, it is said, allowed perjury in two cases; first, to get a friend out of trouble; and, secondly, in any matter relating to a woman, because, as the lawgiver observes, that is necessary for domestic peace.

² In the cases over the £20 limit I find there is much less perjury than in the small cases.

residuum of wilful and corrupt perjury, which urgently calls for a remedy if the administration of justice is not to be reduced to a farce.

There is another ground on which I should like to see petty perjury dealt with summarily. Unfortunately the cases in which perjury can be proved are generally cases of a somewhat mild character. The worst cases get off scot-free. It seems somewhat hard to send a man to the Assizes for perjury, when perhaps the same day a dozen witnesses have committed perjury of a much more aggravated kind, and yet nothing can be done to them. The offence is a difficult one to prove, and a witness doubtless regards it as his misfortune and not his fault when it can be fully proved. Let me give a couple of instances to illustrate my meaning. In the first case the plaintiff's traveller called at a small shop for payment of a debt. The debt was not paid, and he reported the matter that night to his master. The traveller called again on his next journey. The defendant then set up that he had paid the debt, and that the traveller had got back the receipt by a trick. When the case was tried the defendant called six witnesses to prove the payment. The traveller was a man of twenty years' experience and good character, and it is pretty obvious that a man of that sort would not commit his first theft in the presence of six witnesses. But of course it would be impossible to get a conviction in such a case. A jury would not have convicted either party. In the second case the plaintiff's trap was run into by an omnibus. According to the plaintiff's story he called on the defendant the next day and asked for compensation. The defendant told him it was no use his trying to get compensation, as he belonged to an association and could bring fifty witnesses whenever he pleased. The plaintiff then brought his action. His case was that he was driving along quietly, close to the curbstone, on his proper side, and that the omnibus crossed over and ran into him, and further that at the time of the accident there was no other vehicle within sight. His story was corroborated by two or three apparently credible witnesses. The defendant then called eighteen witnesses to prove that the plaintiff was racing another trap, and that in trying to pass it he ran into the omnibus. The jury found for the plaintiff without a minute's hesitation. Now if they were right the discrepancy in the two stories can only be explained by wholesale perjury and subornation of perjury. If the jury were wrong the plaintiff must have committed perjury. A man cannot be mistaken as to whether he is driving alone or racing another trap. But a prosecution would be impossible in such a case, as long as the witnesses all stuck together.

If my suggestion of a summary remedy for perjury were adopted,

I think it would require to be safeguarded by a provision that no prosecution for perjury should be commenced without the leave of either the court or some public official such as the Attorney-General or Public Prosecutor. If the procedure be made simple and easy there would be a danger of its being abused by vindictive people, and respectable witnesses might be deterred from giving evidence. Even as the law stands now, a large number of the prosecutions instituted by private prosecutors are of a vexatious or blackmailing character. Perjury is essentially an offence against public justice, and its prosecution should be determined on by some independent public official.

In connexion with the subject of perjury there is a further amendment in the law which I think would be beneficial. I refer to the abolition of the oath in civil proceedings. As far as I can judge an oath has no longer any religious sanction for the masses. A county court witness swallows an oath as easily as an oyster, and the administration of the oath becomes an irreverent farce. A cynical friend of mine suggests that though the religious instinct be dead among the people, the sporting instinct is happily very much alive, and might be utilized in the cause of truth. In county court cases he would substitute a shilling bet for the present oath. The witness, instead of being made to swear, would be made to bet a shilling that he would speak the truth. No doubt a much greater proportion of truthful evidence might be obtained in this way, and a great deal of useless profanity might be avoided; but the Anti-Gambling League, like the poor, are always with us, and my friend's plan is not feasible. For myself I should like to see a simple declaration substituted for the oath, with a reminder that the witness was liable to be punished for perjury if he did not speak the truth¹.

M. D. CHALMERS.

¹ I am bound to say that witnesses sometimes pay this much respect to the oath.—They try to kiss their thumbs instead of the book, but I am not clear whether they think to avoid thereby the spiritual or the temporal pains of perjury.

PROPERTY, THINGS IN ACTION AND COPYRIGHT.

MR. SPENCER BRODHURST, at the end of his interesting article, intituled 'Is Copyright a Chose in Action?'¹, which appeared in the January number of this REVIEW, submits that copyrights, patent rights, *and rights of all kinds*, if they must be classed as property at all, should be classed under the head of property in constructive possession. And the learned editor, in a note at the end of the article, agrees that, if copyright must needs be a thing either in action or in possession, it must be in possession. Sir Howard Elphinstone, too, has expressed his opinion that copyright is probably not a thing in action². I venture to argue, however, that copyrights and similar rights are more analogous to choses in action than to choses in possession; and to suggest that if such rights must be forced to fit in with a classification of things as being in possession or action, they should be pushed into the class of things in action. The question is one of practical importance; mainly because things in action generally are not to be deemed goods within the meaning of the 'reputed ownership' clause of the present Bankruptcy Act³; and if copyrights are not comprehended in the terms of this exception, it appears that they are goods within the meaning of the clause⁴.

Mr. Brodhurst takes exception to the use of the term 'chose in action' to signify incorporeal things, such as rights⁵. He apparently considers that the word 'thing' ought only to be used in the sense of tangible thing, denies that a right can have any value, and submits that rights are not in reality *property* either in action or in possession⁶. To these contentions it may be replied that, in the current language of English law, the use of the word 'thing' is not limited to tangible things⁷, the term 'things in action' is used to denote incorporeal things, rights are said to be valuable, and valuable rights are included in property. And it is submitted that, in arguing questions of English law, we are bound to accept the ideas which have obtained currency therein, with

¹ L. Q. R. xi. 64, Jan. 1895.

² Stat. 46 & 47 Viet. c. 52, s. 44.

³ *Longman v. Tripp*, 2 B. & P. N. R. 67, 9 R. R. 617; *Eryte Foss*, 2 De G. & J. 230.

⁴ L. Q. R. xi. 69.

⁵ Co. Litt. 6 a and n. (3), 121 b; 3 Rep. 2 b.

⁶ L. Q. R. x. 314, 315.

⁷ L. Q. R. xi. 70.

regard to the nature of rights, legal relations and things; however repugnant those ideas may be to the exponents of what is known as analytical jurisprudence.

It may be admitted that in law the word 'thing' has primarily the sense of tangible thing¹; but the use of the word in this sense in English law is exactly what prevents it from having the same sense as a part of the expression 'thing in action.' And it may be asserted not only that things in action are essentially incorporeal things, but also that almost all incorporeal things are essentially of the nature of things consisting in action. For what is the true ground of the distinction in English law between corporeal and incorporeal things²? I venture to say that the contrast is simply between things which man may *have* in his own possession or keeping, and things which are matter of law. These are little else than things for which a man must go to law³. Corporeal things are those which a man may keep safe for himself, which he may use and enjoy, and of which he may take the fruits and profits, without going to law for aid; as land or cattle. Substantial things like these are what is primarily meant by the word things. And property, in the strict sense of the word, cannot exist apart from the possession of corporeal things⁴. Property, no doubt, includes some matter of law; for a possession which is not protected by a legal remedy in case of its violation can hardly be said to have attained the dignity of property. Full ownership seems to

¹ For proof the reader is referred to Professor Maitland's article on the Mystery of Seisin, L. Q. R. ii. 481; Professor Ames's articles on the Disseisin of Chattels, Harvard Law Review, iii. 23, 313, 337; and the learned editor's article, intitled 'What is a Thing?' L. Q. R. x. 318.

² As is well known, this classification was borrowed by Bracton from Roman law, and is in English law chiefly applied to hereditaments, or things, which may be inherited. It is not, however, confined to real things, as there are such things as incorporeal personal hereditaments. In this case, as in the case of the classification of actions as real or personal, Bracton borrowed the terminology of Roman law: but he and other English lawyers supported and explained the application of the borrowed terms by reasons drawn from English not Roman law. See Bract. fo. 10 b, 52, 53, 220 b, 221; Co. Litt. 6 a, 19, 20; 2 Black. Comm. 20; *Aubin v. Daly*, 4 B. & A. 59; and an article by the writer in L. Q. R. iv. 394.

³ This, I venture to say, is the English sense of *ea quæ in jure consistunt*, the Roman explanation of incorporeal things; *right* in English law meaning especially a claim enforceable at law, that is, a claim which must or may be pursued by action; see Bract. fo. 98 b; Litt. s. 451; Co. Litt. 265 a, 285 a, 291 b, 345; Finch L. 106.

⁴ See note 3 to p. 227 below. That ownership is inseparable from the actual possession of corporeal things appears when we consider that our law will not support a claim of ownership apart from a claim to the possession of lands or goods. There is no action known to the common law in which such a claim can be maintained. Dispossessed owners of goods have no remedy except to bring actions asserting their right to possession of the goods, and their success will depend on their proving such right. Even real actions, including the very writ of right itself, were simply actions to recover possession of land; and without right to possession they could not be maintained; see Bract. 434 b, 437 b; Finch L. 258; 3 Black. Comm. ch. x. and App. 1. Nor can a man prescribe to have the ownership of a corporeal thing; Plowd. 170; see Litt. s. 310; Co. Litt. 195 b.

imply not only freedom from the legal claims of others upon the thing owned, but also the benefit of a duty imposed by law on all to refrain from interference with the possession. But there is much in property which cannot be said to consist in right; which is, in a manner, independent of law. It is of the essence of property to have the thing owned in your own keeping¹, and so to be able to use or dispose of it as you will, free from restraint of law². For example, if I am ousted from my lands, or my goods are taken away from me, I am left with nothing but a right to have them; that is, I may have to depend on law to get them back again. But when the law has given me back mine own, then I have the corporeal things to keep for myself, and no longer depend on law. Then I have pursued my right to its end, the point where claim³ is transformed into substance⁴. When I am in possession, the law leaves me free to exercise as I will the physical powers consequent on having the thing in my own keeping. Thus I may put my oxen to the plough, or kill and eat them as I will. I may sell them or give them away⁵. If my land is truly free from others' claims thereon⁶ (as of *profits à prendre*, easements, &c.), I may cultivate or waste it as I like. I may keep out others with walls and bars. My house is my castle. I need open to none, not even to the king's officer, the representative of the law, if he comes only

¹ To have a thing in your keeping is to have it in your custody or ward, to keep others out of it; to keep and to keep safe is all one; see *Southcote's case*, 4 Rep. 83 b.

² How largely ownership consists in actual possession appears upon consideration of the principle of our law, that any actual possession of things is *prima facie* unrestricted; that the possessor of a thing is presumed to have the fullest ownership which the law allows. Thus an estate by wrong is always an estate in fee simple; see *Williams on Seisin*, 7, 8; *Leach v. Jay*, 9 Ch. D. 44. And in a common recovery a fee simple was recovered without the use of the word 'heirs'; 'for regularly every recoverer recovereth in fee simple'; Co. Litt. 9 b. So those who acquire goods by occupancy obtain the full ownership of them. And finders or wrongful takers of goods may, if dispossessed, recover them from all, except persons rightfully entitled, on the ground that their actual possession of the goods gave them a title against all, except such persons; *Armory v. Delamirie*, 1 Str. 505, 1 Sm. L. C.; *Basset v. Maynard*, Cro. Eliz. 819, 820; *Woodson v. Naughton*, 2 Str. 777; *Rackham v. Jessup*, 3 Wils. 332.

³ See Co. Litt. 291 b, as to the meaning of *daim*.

⁴ That substance is equivalent to property, see note 6 to p. 227 below.

⁵ Consider also the physical power enjoyed by any possessor of land of making of a feoffment in fee with livery of seisin; and the peculiar consequences, at common law, of such a feoffment if made by one not seised in fee simple; see Litt. ss. 592-599, 611; Co. Litt. 330 b, and n. (1).

⁶ Of course no land in England, unless in the hands of the crown, is free from the lord's claims thereon; and in the days of military tenures lords' interests were substantial. But the freeholder seised of the land has always been regarded as the owner. He has the land, while the lord has only a bare incorporeal hereditament. The freeholder alone could alien the land by feoffment, and was the proper person to sue for recovery of the land if ousted. No question of waste could arise between lord and tenant in fee or in tail; except, indeed, of the lord's waste during a wardship in chivalry. And a lord has in general no right to enter on his tenant's land, and cannot break open the house-door to distrain for his services; see Bro. Abr. Trespass, pl. 16, 226, 273, 384; Litt. a. 553; Co. Litt. 52 b; 2 Inst. 105; Finch L. 134; and next note.

to vex me with civil process at suit of a fellow subject¹. I may build high walls to prevent others from looking in at me². So long as I suffer nothing noisome to escape my boundary, and do not endanger my neighbours' lives, health or property, I cannot be restrained in my use of my land³. The effect of the natural use of my land may be to deprive my neighbour of an advantage: but I may continue such use, even though I do so maliciously, without profit to myself, and simply with intent to do him harm⁴. I need not go to law even to maintain myself in possession. If an intruder refuse to go out on request, I may lay hands upon and gently but forcibly eject him. If others forcibly break in, I may forcibly turn them out⁵. Such, I submit, is the nature of property.

How different is the nature of incorporeal things! They are mere *claims*⁶ to have things (in the primary sense) which others possess, or upon things, which others possess, or to have things or services rendered by others. They are claims which may be satisfied by acquiescence therein, but which, if disputed, can only be enforced by going to law. They are incorporeal, because one, who has only a claim, has no thing (in the primary sense) which he can keep safe for himself; he can only look to law for security, that is, he has mere *right*. Such things cannot be seized or taken. Of some of them, however, there may be a perception of the profits; as in the case of a rent or a right of common of pasture. Of things, which have this quality, there may be a kind of possession; since they result in something which may be transformed into substance. But they are not capable of such realization as shall result in the extinction of the right. The accessory right may be transformed into substance, as by payment of an instalment of rent. But the principal thing remains something which you can never *have* to keep for yourself; a mere claim still liable to be disputed. It is true that if your claim has once met with substantial acquiescence, the law will give you a remedy to ensure its satisfaction in future. But you must always go to law to enforce it; your right still remains your only security.

There are, however, certain claims, to enforce which you are not obliged to go to law; but which may be satisfied by taking some *thing* for yourself. These appear to be of two kinds: claims which are extinguished and transformed into substance by the taking of

¹ *Semayne's case*, 5 Rep. 92 b; *American Concentrated Must Co. v. Hendry* (1893), 9 Times L. R. 340, 445. 5 R. 331.

² See *Tapling v. Jones*, 11 H. L. C. 290, 305, 311.

³ See 1 Seton on Decrees, 524 et seq., fifth edition.

⁴ See *Giles v. Walker*, 24 Q. B. D. 656; *Corporation of Bradford v. Pickles*, '95, 1 Ch.

⁵ 145.

⁶ *Green v. Goddard*, 2 Salk. 641; *Weaver v. Bush*, 8 T. R. 78.

⁷ See note 3 to p. 225, ante.

the thing; and claims which are only partially satisfied by the taking, and still remain as things, which you must go to law to enforce. Rights or titles¹ to land, which may be asserted by entry, and rights to goods, which may be asserted by taking, are instances of the former kind. Rents recoverable by distress are examples of the latter. Claims of the former kind have given rise to an extension of the use of the word *property*, at least as regards goods². For when the owner of goods parts with or is deprived of their possession he no longer has property in the strict sense of the word. He is left with mere right of property³. The use of the word *property* was, however, extended so as to include the mere right of one who had bailed goods so that he might at any time retake them, or from whom goods had been wrongfully taken⁴. In other words, it was recognized that a man might have property in goods, although he had no *thing* in possession, if he had a good claim to take some particular *thing* for himself out of others' possession⁵.

But the widest sense of the word *property* is that of valuable things; and amongst such things mere rights are included, if valuable in money⁶. Claims resulting in regular profit, as rents,

¹ See note 1 to p. 229 below.

² The same principle has worked with even more marked results in the case of land. Thus the freeholder is seised, as of a corporeal hereditament, of land held by a tenant for years, or a copyholder.

³ Thus the property in goods wrongfully taken was said to be in the taker; 27 Ass. pl. 64; Y. B. 8 Edw. III. 10, pl. 30; 2 Hen. IV. 12, pl. 51; Finch L. Bk. iii. ch. 6. And in Y. B. 6 Hen. VII. 9, pl. 4, Brian C.J. gave his opinion that if goods are wrongfully taken from their owner, the property is divested, and he has nothing but mere right of property. So a disseisee of lands has only bare right to the lands, and no estate or interest therein; see Litt. ss. 450, 451, 455; Co. Litt. 266 a, 267 a, 369 a, 374 b.

⁴ See per Needham J., Y. B. 2 Edw. IV. 5, pl. 9; Y. B. 15 Hen. VII. 15, 16, pl. 6; Moore, 19, 20, pl. 67; 1 Hale, P. C. 513.

⁵ This left without the pale of property the right of an owner who had temporarily parted not only with possession of his goods, but also with all right to take them, as upon a letting for hire or a pledge. Thus in *Wood v. Foster*, 1 Leon. 42, 43 (a case to which my attention was called by Professor Ames), Windham J. said that if I let certain sheep to one for two years, now upon that lease somewhat remains in me, but that cannot properly be said a property, but rather the possibility of a property, which cannot be granted over. It was held, however, by the Court of Exchequer in *Franklin v. Neate*, 13 M. & W. 481, reversing the ruling of Parke B., at Nisi Prius, that a pledgor of goods retains a property therein, which he can sell. This decision was no doubt a departure from the principles of the earlier law: but it seems consistent with the mercantile spirit of the modern common law, which permits the sale of goods at sea, although they may be subject to a lien for freight, and allows one who has purchased but not paid for goods to acquire the property therein subject to the vendor's lien for the price, and even to resell them (i.e. to transfer his property to another) subject to such lien; see *Lickbarrow v. Mason*, 1 Smith L. C.; *Sanders v. Vanzeller*, 4 Q. B. 260, and cases there cited; *Dixon v. Yates*, 5 B. & Ad. 313; Benjamin on Sale, Bk. v. ch. 2, pp. 632-641, second edition.

⁶ See the cases cited in a former article by the writer in L. Q. R. x. 146, notes 1 and 2. Thus Lord Mansfield remarks (Cowp. 307), 'What is substance? It is every property a man has. . . Real and personal effects are synonymous to substance, which includes *everything that can be turned into money*.' So Austin (Jur.

were early recognized as valuable, and capable on that account of being included in *assets*, or property of equal value to charge an heir with his ancestor's specialty debt, or to bar an issue in tail by lineal warranty¹. It was not, however, until modern times that claims not capable of producing immediate profit became generally valuable. For it was only under modern law that mere rights or claims were allowed to be transferred with comparative freedom². Freedom of transfer made them saleable, and therefore valuable. Furthermore, it endowed them with the possibility of transformation into substance. As we have seen, in the case of purely incorporeal things where there is a continuing claim, the mere right can never be extinguished by the reduction of some *thing* into possession. But if such rights be transferable, they may be transformed into substance by being exchanged for the ownership of money³.

If we examine the nature of things in action, we shall soon see that they are merely claims enforceable at law; and that a man entitled to a thing in action has no *thing* (in the primary sense), and has not even anything which he can take. For example, in the case of a chose in action proper, as a debt, what is the thing, which is or lies in action, and which the person entitled thereto is said to have? It cannot be anything tangible, for the contracting of a debt (otherwise than by judgment and except to the crown) gives the creditor no interest whatever in, or charge upon, any money or other property of the debtor⁴. If the debtor refuse payment, the creditor cannot take the amount due to him out of the debtor's money without committing theft; he has no legal remedy but to sue the debtor. When a debt is paid, the creditor ceases to have a chose in action: but the true effect of payment is not that the thing, which he had before in action, is handed over to him and so becomes a thing in possession. It is that the debtor's obligation is discharged and extinguished⁵, and the former creditor (if paid in cash) acquires the ownership of certain coins,

819, fourth edition) points out that obligations, or rights against determinate persons, are included in a man's *property* in its widest sense, as being applicable to the discharge of his debts. Savigny, too, after showing that an obligation is a right to restrain another's freedom of action, points out that it resembles ownership, in that it is capable of valuation in money, which is nothing else than transformation into the ownership of money; *System des heutigen römischen Rechts*, vol. i. s. 53, pp. 338-340.

¹ See Co. Litt. 374 b; 6 Rep. 58; *Robinson v. Tong*, 3 Vin. Abr. 145 (*Assets*, pl. 28).

² It will be sufficient to mention the freedom of assignment of mere rights given by the bankruptcy law; the abolition of the necessity of attornment to the validity of grants of reversions; the equitable rule allowing of the assignment of a possibility for valuable consideration; and the freedom acquired in modern law of assigning things in action by power of attorney.

³ See note 6 to p. 227 above.

⁴ Turner [L.J., *Johnson v. Gallagher*, 3 De G. F. & J. 519, 520; James L.J., *Pike v. Fitzgibbon*, 17 Ch. D. 461.

⁵ Bract. fo. 101 a.

in which he previously had no interest at all. The thing therefore which lies in or is to be exacted by action, and which the creditor has, appears to be no tangible object, but to be the debtor's duty to pay the amount owing. That is to say, what the creditor has is the right to enforce an obligation, which has always been considered to be an incorporeal thing. The incorporeal nature of a debt is emphasised by the fact that the obligation to pay may be discharged by the debtor's bankruptcy. That the right which constitutes a debt is valuable is sufficiently apparent from the fact that people are found to pay money for its transfer to them. That the right is property is proved by the fact that it will pass under a bequest of all the creditor's property, or to the trustee, on the creditor's bankruptcy.

Again, if a man have a right to recover lands or goods by action, he has no doubt something lying in action: but what is this thing? The matter appears to stand in this way. The law regards a rightful title¹ to recover lands or goods as a right distinct from and antecedent to the remedy for asserting the title². The effect of this title is that any one who is wrongfully possessed of the land or goods is bound to render the same to the person entitled. It is only upon the *breach* of this duty that a cause of action to recover lands or goods arises³. And the action is brought, not, as Mr. Brodhurst suggests, for an acknowledgment that the title or

¹ I hope it will not be considered impertinent if I remind the reader that *title* to land especially means a claim to enter land for some cause, which is not a cause of action, as upon forfeiture for condition broken or alienation into mortmain; while right to land without possession, but with remedy by action, was especially termed *right*: but that title was also used in a wider sense, including right; Co. Litt. 345; Finch L. 106. I use the word in the wider sense in the text. Here it may be noted that Mr. Brodhurst (L. Q. R. xi. 69) states that in 10 Rep. 48 there seems to be a distinction drawn between rights and things in action; on the ground, apparently, that Coke there says that rights, titles, and things in action shall not be assigned to strangers. It is obvious, however, that Coke here uses the words *rights* and *titles* in the strict sense above mentioned, and that by things in actions he means things in action proper, i. e. rights arising out of a cause of action and capable of release. For shortly after he points out that all rights, titles, and actions may be released to the terre-tenant.

² Thus where title to land might be asserted by entry, a release of all real actions to the terre-tenant was no bar to the exercise of the right of entry, and a release of all personal actions to the wrongful possessor of goods did not prevent the owner from retaking them; Litt. ss. 496-498. So if a disseisor made a lease for life with remainder in fee, or enfeoffed two jointly in fee, a release by the disseisee of his right to the tenant for life, or one joint tenant, would enure for the benefit of the remainderman or other joint tenant; but if the release were of all real actions only, the disseisee would not be barred from bringing a real action against the remainderman or other joint tenant surviving; Litt. ss. 470-472; Co. Litt. 275 b, 285 b, 286 a; 8 Rep. 152; 10 Rep. 51 b. And the old statutes for the limitation of real actions barred the remedy but not the right to the land; *Hunt v. Burn*, 2 Salk. 423.

³ This appears from the words *Præcipe quod reddat*, &c., *et, nisi fecerit*, &c., *summones eum*, &c. in the original writ in real actions in the King's Court and in detinue; Glanv. i. 6, x. 2, 13; Reg. 139, 227 et seq.; F. N. B. 5 I. 138, 207 H.; Finch L., 257; 3 Black. Comm. App. 1, § 4; and see Bract. fo. 99 a, 102 a; Litt. ss. 495, 499, 691, 692; 8 Rep. 151 a; 10 Rep. 51 b, and note 2 to next page.

the right of action to recover the land or goods exists, but to give effect to, or realize the benefit of, that right or title. Now it appears that a chose in action pure and simple is a thing, which must arise out of some good cause of action, and must be capable of being released by a release of actions¹. Every cause of action at the common law must be against some particular person²; and, as we have seen, cause of action to recover lands or goods is the breach of an obligation to render the same. You cannot take or seize the benefit of a right of action to recover lands or goods³, any more than you can take the benefit of any other obligation⁴. It must therefore be an incorporeal thing. And right of real action and right to land are plainly shown to be incorporeal things, because they might be released to the terre-tenant by deed⁵. And everything which can be released by a release of personal actions must be incorporeal.

A thing in action then is properly the benefit of an obligation arising from a breach of some antecedent duty⁶. It would also appear to be the benefit of some real, mixed or personal action, that

¹ *Diggs's case*, Moore, 133, pl. 279; Litt. ss. 512, 513; Co. Litt. 292 b; and see notes 1 and 2 to preceding page.

² Real actions must have been brought against the tenant of the freehold; see Litt. ss. 495, 661; Co. Litt. 286 a, 349 b; 8 Rep. 151 b. Personal actions must obviously be brought against a particular person. It is worthy of note that *right to land with remedy by action* (note 1, last page) was *ius in rem*, giving rise to a right to sue the tenant of the freehold for the time being, without regard to the means whereby he became seised: but right of real action is *ius in personam*. Thus if a disseisor made a feoffment, after which the disseisee released all real actions to him, the disseisee was not barred from bringing a real action against the feoffee; for as the disseisor was not the terre-tenant at the time of the release, the disseisee had no cause of real action against him, and the release was simply void. Indeed, even if the release had preceded the feoffment, the feoffee could not plead it, for he was not privy to it. This plainly shows the personal nature of a right of real action. It has also been said that a release of real actions by a disseisee to a disseisor seised is no bar to a real action by the heir of the disseisee, because a right remained, which might descend to the heir; or to a writ of entry in the *per* and *cui* by the disseisee himself against the heir of the disseisor, because that action was not *in esse* at the time of the release. See Litt. ss. 494, 495, 499; Co. Litt. 285 b; 8 Rep. 152 a; 10 Rep. 51 b. In *Winchester's case*, 3 Rep. 2 b, 3 b, the judges held that right to land with remedy by action only was a thing consisting in privy (meaning, it seems, that it could be asserted only by action against some person, i.e. the tenant of the freehold for the time being); and they called it a right, which consists only in action. They also held that a remainderman after an estate tail, who might bring a writ of error to reverse a common recovery, had no right, the writ of error being a bare action, which consists more in privy than an action which is accompanied by a right. This authority sufficiently answers Mr. Brodhurst's contention (L. Q. R. xi. 69) that rights cannot properly be included in the term things in action. Real actions were abolished in 1833; Stat. 3 & 4 Will. IV. c. 27, ss. 36-39. But as the test of obtaining relief under the present practice is whether the plaintiff has a good cause of action, it is still material to consider the nature of a cause of action to recover lands.

³ Where a man entitled to land was put to his action, his entry was unlawful; see Litt. ss. 385 et seq., 592 et seq., 691, 692, 696; Co. Litt. 363 b, 364 b.

⁴ Ante, p. 228.

⁵ Litt. ss. 444, 447, 466, 495, 515, 519, 521, 531, 534; 10 Rep. 48.

⁶ Ante, p. 229.

is, of an action brought for the realization of some right, which is valuable as tending to result in the ownership of land, goods or money¹. In common parlance upon legal as upon other subjects, men are not scrupulous of accurate expression, and will always take a short way; so we speak indifferently of actions to recover land, goods or money, or even allude to money recoverable by action only as a thing in action². But that does not alter the nature of things in action, or cause them to be anything but mere rights, not included in property in the strict sense of the word, because that is confined to the ownership with possession of tangible things, but comprehended in property in its widest sense, because valuable as being possibilities of property in the narrow sense³.

The term *chose in action* has, however, been extended to other things than things arising from some cause of action. Thus it has been applied to the benefit of an obligation arising from contract, whether resulting in the payment of a sum certain or sounding in damages only, although no action can be maintainable before breach of the obligation⁴. And the benefit of a claim to enter upon lands has also been numbered among things in action, whether the cause of entry were a cause of action or not⁵. The reason appears to be that such benefits are things which, if wrongfully withheld, you must bring an action to realize, in other words, which you must go to law to secure. Government stock and shares in joint-stock

¹ See Litt. ss. 500, 503; Co. Litt. 288 b, 289 a.

² Mr. Brodhurst vouches the authority of Paston J. for using the expression *chose in action* of a corporeal chattel—a box containing deeds (L. Q. R. xi. 69); but he makes no attempt to explain what Paston meant. As far as I can understand the very difficult and apparently corrupt language of Y. B. 9 Hen. VI. 64, pl. 17, it was pleaded that W. H. had granted to J. P. a box of deeds, of which T. R. was in possession to the use of W. H. Paston J. objected that it was not alleged that W. H. was the owner of the deeds and, for aught that appeared, he might himself have been only a bailee. If so, after his sub-bailment, he would have but a thing in action (meaning, apparently, nothing but the benefit of the sub-bailee's obligation to return the box to him); and the gift of such a thing would be void. Again, Mr. Brodhurst says that in *Franklin v. Neate*, 13 M. & W. 481, Parke B. ruled at Nisi Prius, 'that the subject-matter of the action, a pledge, was a thing in action,' and claims this as an authority for applying the term thing in action to a corporeal chattel. But on referring to the report, we find that what is stated is that it was contended that no property passed by the sale of a chattel in pawn; it was merely an assignment of a *right of action*, with an equity of redemption; and that Parke B. was of that opinion. And that the thing in action which a bailor has is not the tangible chattel bailed appears clearly from this:—If a bailor entitled to the return of his chattel release to the bailee all personal actions, what passes by the release cannot be the tangible chattel, for the bailee has it already; nor is it the right of ownership of the chattel, for that remains in the bailor, and enables him to take his chattel, notwithstanding the release; but it is only the bailor's right to enforce by action the bailee's duty of restitution; Litt. s. 498.

³ See pp. 224, 227 above.

⁴ See Litt. s. 514; Co. Litt. 144 b, n. (1), 292 b; 2 Black. Comm. 397, 436; *Expte Ibbetson, Re Moore*, 8 Ch. D. 519; *Brice v. Bannister*, 3 Q. B. D. 569; *Walker v. Bradford Old Bank*, 12 Q. B. D. 511.

⁵ *Finch L.* 107; *Shep. Touch.* 231; see note 1 to p. 229 above.

companies have also been included in the class of things in action, partly on the ground that they are analogous to obligations arising from contract, partly because they are incapable of manual seizure¹. A chose in action then, in the extended sense of the word, would seem to be a thing which, if wrongfully withheld, you must bring an action to realize; a thing which you cannot take² but must go to law to secure. Let us see if the term, so extended, is applicable to copyright.

What sort of a thing is copyright? Mr. Brodhurst maintains that it is a threefold right, namely, the right to publish a work, to make copies of it, and to prevent others from doing so. It is submitted, however, that publication and making copies of a work are acts which may be done, independently of copyright, in pursuance of the common liberty of action which the law allows, and that copyright is essentially the *exclusive* right or monopoly of making copies of a published work; that is to say, it is the right to have all other persons refrain from making copies of that work³. It is thus a right to a *duty* of forbearance, though not, as in the case of an obligation, on the part of a particular person, but by all. It confers no interest in any tangible object, but merely imposes a restriction on others' freedom of action. If the duty so imposed be not rendered, how can it be exacted save by action against infringers of the monopoly? On this ground, may not copyright be said to be a thing in action?

No doubt copyright cannot be a thing in action in the strict sense of the word, because, as Mr. Brodhurst and the editor point out, there is no cause of action before infringement of the copyright. But the absence of a cause of action seems to be no objection to classing copyright as a chose in action in the wider sense. Of such

¹ See *Wildman v. Wildman*, 9 Ves. 174, 177, 7 R. R. 153; *Humble v. Mitchell*, 11 A. & E. 208; *Colonial Bank v. Whinney*, 30 Ch. D. 286, 11 App. Cas. 439, 446, 447.

² You can, of course, take the benefit of a right or title of entry: but this does not appear to consist merely in action, and the fact that it should have been included in things in action only shows how widely the term has been extended.

³ See the definitions of copyright given by Lord Mansfield in *Millar v. Taylor*, 4 Burr. 2306, in the successful argument in *Donaldson v. Beckett*, 2 Bro. P. C. 134, by Pollock C.B., in *Chappell v. Purday*, 14 M. & W. 303, 316; by Crompton J., Alderson B., Parke B., Pollock C.B., Jervis C.J., and Lords Cranworth, Brougham, and St. Leonards in the great case of *Jefferys v. Boosey* (1854), 4 H. L. C. 815, 847, 912, 920, 935, 944, 955, 962, 977, 978; and by Stirling J., in *Warne v. Seebohm*, 39 Ch. D. 73, 80, 81. It is true that Erle J., in *Jefferys v. Boosey*, 4 H. L. C. 871, submitted that copyright was not a personal privilege in the nature of a monopoly. But the weight of authority is clearly against this opinion. And the decisions of the House of Lords in *Donaldson v. Beckett*, 4 Burr. 2408, 2 Bro. P. C. 129, and *Jefferys v. Boosey* established as law the rule that the common law gives an author no monopoly of reproducing his published work. And although the early history of copyright (as to which see 4 Burr. 2306-2308; Scrutton on Copyright, ch. i.) may be thought to point to a different conclusion, that rule is nevertheless the law of the land. An author's exclusive right of producing his unpublished compositions (lately vindicated in *Caird v. Sims*, 12 App. Cas. 326) is distinct from copyright; see 12 App. Cas. 343.

a chose in action copyright seems to have the proper characteristics. You cannot take the monopoly given by copyright, and you must go to law to secure it. It is a claim on other persons' conduct; so is the benefit of an obligation. If it be objected that copyright cannot be a chose in action, because it is a claim available against all persons generally, it may be answered that right to land with remedy by action only has been judicially declared to be a thing consisting only in action; and this, as we have seen, is *jus in rem*¹. And copyright cannot consist any the less in action, for that it is only a right to others' forbearance and not the right to recover a tangible thing. It has been already shown that in all cases the thing which is or lies in action is essentially the duty².

Mr. Brodhurst refers³, in support of his argument that copyright is a thing in constructive possession, to the fact that the law regards certain incorporeal hereditaments as capable of being possessed. But he omits to tell us that to acquire possession of an incorporeal hereditament meant something more than to acquire a title thereto by grant. It meant, as has been already noticed⁴, to take the fruits or profits of the right or to exercise the same by user. This is well shown in Professor Maitland's article on the Mystery of Seisin in the second volume of this REVIEW, where he points out that it was conceived in the old law that in order to gain possession of a mere right, you must take the esplees or profits, or *exploit* your right⁵. Thus no action lay for the recovery of a rent seek unless the grantee had acquired seisin thereof by receipt of some parcel of the rent⁶. And possession of an advowson in gross could not be gained without exercising the right of presentation⁷. Let us see whether this doctrine can be applied to copyright. At first sight it is not very easy to point out how copyright can be susceptible of any such possession as the law recognized in the case of incorporeal hereditaments. Can the proprietor of a copyright be said to exploit his

¹ See note 2 to p. 230 above.

² See pp. 228-230 above.

³ L. Q. R. xi. p. 73.

⁴ See p. 226 above.

⁵ L. Q. R. ii. 481, 490-495.

⁶ Litt. ss. 217, 218, 233, 235, 236, 341; Co. Litt. 160 a; and see 6 Rep. 58. It may be interesting to point out that this doctrine does not appear to be obsolete. Since the abolition of real and mixed actions, the grantee of a rent has been allowed to bring an action of debt for his arrears against the terre-tenant; *Thomas v. Sylvester*, L. R. 8 Q. B. 368; *Re Blackburn, &c. Building Society, Expte Graham*, 42 Ch. D. 343; *Searle v. Cooke*, 43 Ch. D. 519. But I see no reason to suppose that such an action will lie where the grantee would have had no cause of action at common law; see *Murray v. Thorniley*, 2 C. B. 217; *Whitaker v. Forbes*, L. R. 10 C. P. 583; *Companhia de Moçambique v. British South Africa Co.*, '92, 2 Q. B. 358; '93, A. C. 602. Seisin in deed of the rent was as necessary to support an action for the recovery of a rentcharge as in the case of a rent seek; Co. Litt. 160 a. If, however, the rent be granted by way of use executed by the statute, it appears that the grantee will at once acquire seisin in deed of the rent, without receipt of any part of it; *Heelis v. Blain*, 18 C. B., N. S. 90.

⁷ See Maitland, *Mystery of Seisin*, L. Q. R. ii. 494, and authorities there cited.

exclusive privilege by peaceably and uninterruptedly making and selling copies of his work, if these acts are no more than an exercise of his common liberty of action? Or must he actually exercise his privilege, that is, enforce the restraint, which it imposes? But the restraint is enforceable by action only; and it seems impossible to maintain that a man cannot have possession of a copyright without bringing an action for its infringement. For the fact that infringement of copyright is a good cause of action would seem to show that the proprietor of the copyright is effectually seised of his right¹. Curiously enough, however, the present law of copyright in books affords an exact parallel to the old law as to acquiring seisin of incorporeal hereditaments. Under Talfourd's Act², the privilege of copyright is secured to the author or his assigns on the first publication of a book; but no remedy is maintainable for the protection of the author's privilege until the proprietorship of the copyright be duly entered in the register. In this instance, therefore, it may surely be contended that the author of a book cannot be effectively in possession of his copyright until he is in a position to protect himself against infringement of his right³. And the overt act of dominion, which consists in duly registering the proprietorship, may be regarded as taking possession. But if, in order to gain possession of the copyright in a book, you must place yourself in the position to bring an action, does not that tend to show that copyright is of the nature of a thing lying in action?

I further contend that, although copyright may be susceptible of a kind of possession, and even though the proprietor of the copyright may be effectually armed with every remedy and so fairly seised of his right from its very inception⁴, the proprietor of a copyright cannot on that account be said to have a *chose in possession*. For I submit that to have a *chose in possession*, as the term is used in English law, is to be the owner of a tangible thing⁵; and that,

¹ Want of right and want of remedy are in one equipage, as Lord Coke says, 6 Rep. 58 b, and the converse of this appears to be true.

² Stat. 5 & 6 Vict. c. 45, ss. 3, 11, 24.

³ It seems to be a question whether the assignee of a copyright must register in order to entitle him to sue for infringement, if the original proprietorship were registered and the assignment were by writing only; see *Wood v. Boosey*, L. R. 2 Q. B. 340.

⁴ This appears to be the case with persons entitled to the sole liberty of representing a dramatic piece; Stat. 3 & 4 Will. IV. c. 15; 5 & 6 Vict. c. 45, ss. 20, 24.

⁵ See p. 224 above. When it is said that marriage is an absolute gift to the husband of his wife's chattels personal in possession (Co. Litt. 351 b), that signifies that the ownership of the wife's tangible chattels vested in the husband absolutely. This appears from the fact that, where the wife had property in the extended sense of a mere right of ownership of tangible goods (see p. 227 above), such property was held, against the earlier rule, to vest in the husband; but no other mere right of the wife would vest absolutely in the husband; see *Y. B. 20 Edw. I. 174*; *Fitz. Abr. Replevin*, 43; *Moore*, 25, pl. 85; *Powis v. Marshall*, Sid. 172; 1 *Kobbe*, 641; *Bac. Abr. Detinue* (A.). Thus a personal annuity granted to the wife for life was

where mere rights were considered as capable of being possessed, though they may in some cases be regarded as things of a mixed nature, viz. partly in possession and partly in action, they are clearly distinguished in law from things in possession pure and simple¹. Thus if such possession as the law conceived of were actually acquired of an incorporeal hereditament, that did not alter the nature of the thing. An advowson in gross remained a purely incorporeal hereditament lying in grant², notwithstanding that a grantee thereof might have acquired seisin of the thing by exercising the right of presentation. So a rent seek, although it was so far considered to be capable of manual occupation that a man might be said to be seised thereof *in his demesne* as of fee³, remained a purely incorporeal hereditament lying in grant⁴, notwithstanding that the grantee might have acquired actual seisin thereof by receipt of some part of the rent. Similarly in the case of a married woman subject to the common law, it appears that her husband may reduce her stock or shares into his possession by procuring their transfer into his own name⁵. But if he were to do so, they would not become things in possession. On the contrary, they would remain his things in action; and if he were to mortgage them without transferring them into the mortgagee's name, and afterwards be adjudged bankrupt, they would not pass to the trustee as having been in his reputed ownership. Again, the recovery of debt or damages by action is a kind of reduction into possession of a mere right, namely, the obligation to pay⁶, but does not immediately result in the acquisition of a thing in possession. For the judgment, which ends the action, is a thing in action, because it may be sued upon; though it is not merely in action, because it may be satisfied, without action, by levying execution⁷. Still a judgment debt is a mere obligation to pay, which may be

held to survive to her, even though her husband had released it to the grantor; *Thompson v. Butler*, Moore, 522, pl. 689.

¹ Thus where a husband was seised of a rent seek in right of his wife, instalments of the rent, which became due during the coverture but remained unpaid, were said to be chattels real of a mixed nature, viz. partly in possession and partly in action; but they were not considered to be chattels (real or personal) in possession simply; see Co. Litt. 351. So a judgment debt would seem to be a thing of a mixed nature, but not a chose in possession; post, p. 236. It may be remarked that Lord Justice Fry's dictum (30 Ch. D. 285), that the law knows no *tertium quid* between personal things in possession and those in action, seems scarcely correct.

² Litt. s. 628.

³ Litt. s. 10.

⁴ See Litt. ss. 616-618; Co. Litt. 332 a.

⁵ See *Wildman v. Wildman*, 9 Ves. 174, 177, 7 R. R. 153; *Nicholson v. Drury Buildings Estate Co.*, 7 Ch. D. 48, 55; Roper, Husband and Wife, 221, second edition.

⁶ Where a husband could and did sue alone upon his wife's cause of action, and he obtained judgment, but died before execution sued, the judgment debt did not survive to the wife, but passed to his representatives; 1 Roper, Husband and Wife, 212, 214, second edition. See also 2 Black. Comm. 436-438.

⁷ Litt. s. 504; Co. Litt. 289 a; 3 Black. Comm. 160, 421.

discharged by bankruptcy; and the creditor, far from having a thing in possession¹, may be deprived even of the proceeds of execution by the debtor's bankruptcy before the execution is completed². And if a woman entitled to a judgment debt married under the common law, the benefit of the debt did not vest in her husband upon marriage, though it became his upon an award of execution³. So that a judgment debt cannot be a simple chose in possession. I therefore submit that, although copyright may be a thing of which a man may acquire a kind of possession, that does not make it a *chose in possession*, as the term is used in English law⁴.

Lastly, is it seriously contended that, in the case of a woman entitled to copyright, who married under the common law, the copyright vested absolutely in the husband upon marriage? Considering that the wife is entitled to a mere right of restriction on others' conduct enforceable by action only, I maintain that if the husband would prevent the copyright from remaining to his wife by survivorship, he must take such steps as are possible to acquire the sole dominion of it⁵. That is to say, he must procure himself to be registered as the proprietor, and so place himself in a position to exercise the sole control over the effective part of copyright, the right to sue for its infringement. Until he has done so, any infringement of the copyright must be a cause of action by the wife, and, like any other tort against the wife, must be sued on, at common law, by the husband and wife jointly. And so long as this remains the case, the husband surely cannot be said to be

¹ Upon execution against the debtor's goods under a writ of *fi. fa.*, the debtor remains the owner of the goods until they are sold by the sheriff; *Payne v. Drewe*, 4 East, 523; *Thurston v. Mills*, 16 East, 254, 274; *R. v. Wells and Allnutt*, 16 East, 278, n., 14 R. R. 347.

² This has been the case from the earliest times of the bankruptcy law; see Stat. 21 Jac. I, c. 21, s. 9; *Philips v. Thompson*, 3 Lev. 69, 191. By this statute a judgment creditor was deprived of the charge, which the judgment gave him, on the debtor's lands, if he had not completely taken the lands in execution before the debtor's bankruptcy; *Newland v. Anon.*, 1 P. W. 92; *Orlebar v. Fletcher*, *ibid.* 738, 739; *Sharpe v. Roahde*, 2 Rose, 192. But the charge on a judgment debtor's lands given by Stat. 1 & 2 Vict. c. 110, s. 13, was not defeated, if entered up one year before the debtor's bankruptcy; *Expte Boyle*, 3 De G. M. & G. 515. The abolition of the lien of judgments on lands by Stat. 27 & 28 Vict. c. 112, restored the old law in the case of bankruptcy. The present law is contained in Stat. 46 & 47 Vict. c. 52, s. 45; see *Figg v. Moore*, '94, 2 Q. B. 690; *Trustee of Burns v. Brown*, '95, 1 Q. B. 324.

³ *Woodyer v. Gresham*, 1 Salk. 116.

⁴ It is only just to Mr. Brodhurst to note here that his contention is that copyrights should be classed as things in constructive possession. But I confine my argument to the question, what place should copyright occupy in the classification authoritatively applied to chattels personal? And I cannot find that the law recognizes things in constructive possession as a distinct class of things. Tangible goods, of which the owner may resume possession at will, seem to be subject to the same law as things in possession pure and simple; see note 5 to p. 234 above; *L. Q. R.* x. 153, 154.

⁵ See note 5 to p. 234 above.

possessed of the copyright, or to have any thing in possession. Upon these considerations I submit that, if the classification of chattels personal as being in possession or action must be applied to copyright, it ought to be ranged with things in action rather than things in possession.

T. CYPRIAN WILLIAMS.

CHOSSES IN ACTION.

MR. BRODHURST'S argument¹, if I rightly understand it, is that 'choses in action' properly means some corporeal thing which a person has the right to recover by legal proceedings, not property, such as copyright, which is in its nature incapable of physical possession. Or, to put the argument still more shortly, copyright is from its inception as much in possession as it ever can be, and therefore it is a chose in possession and not a chose in action. Mr. Brodhurst also makes some interesting remarks on the nature of possession in the case of copyright, and on the problem whether 'choses in action' means the property to be recovered or the right to recover it. These questions are no doubt fit matters for discussion in an institutional work, where a proper classification is essential to guide the student; in such a work it is necessary to point out the distinction between choses in action in the original sense of the term, which are essentially transitory rights *in personam*, and such forms of property as patents and copyrights, which are essentially permanent rights *in rem*. But these are not the questions which I understand Sir Howard Elphinstone to have raised in the pages of this REVIEW: what he and Mr. Cyprian Williams and I have discussed is the practical question whether certain rights or forms of property are or are not choses in action.

To make my meaning clearer I will put some cases. A woman, being entitled to a copyright, marries before 1870, and makes no settlement: her husband dies, having done nothing with reference to the copyright, and having by his will left all his personal property to *X*. Who is entitled to the copyright? According to Mr. Brodhurst, it is and always was a chose in possession, and therefore belongs to *X*. I maintain that it is a chose in action, and that, not having been reduced into possession by the husband, it belongs to his widow. Or suppose that *A*, a publisher, is entitled to the copyright in a book which he publishes and that he is the registered proprietor: he assigns the copyright to *B* as security for a loan, but remains registered as proprietor: *A* becomes bankrupt. Who is entitled to the copyright? According to Mr. Brodhurst it passes to the trustee in bankruptcy. I maintain that being a chose in action, it is excluded from the reputed ownership clause, and

¹ 'Is Copyright a Chose in Action?' L. Q. R. xi. 64.

that *B* is entitled to enforce his security. Again, if the owner of a copyright assigns it as security for a loan, must he observe the requirements of the Bills of Sale Acts? According to Mr. Brodhurst he must: according to the practice of conveyancers he need not.

I confess I cannot follow Mr. Brodhurst when he says that a share in a company is analogous to a debt. I think Mr. Brodhurst is unconsciously influenced by the fact that the interest or right of property represented by a share is usually stated in pounds sterling, and that the original shareholder probably paid that amount for the share, for Mr. Brodhurst speaks of the possibility of the shareholder 'recovering' his capital by legal proceedings against the company. But the creation of a share capital (apart from the question of finance) is merely a convenient way of fixing the extent to which each shareholder is entitled to participate in the management, profits, and assets of the company. Where a company is limited by guarantee without a share capital, and consists of 500 members having equal interests, each member has a share or interest in the management, profits and assets of the company to the extent of one 500th; the result is practically the same as if the company had a share capital of £50,000, and each member held paid-up shares to the amount of £100, but no one would, I think, contend that the interest of a member of the former company bears any resemblance, in form or in substance, to a debt due to him by a private person. Again, Mr. Brodhurst says that in certain cases a shareholder in a company 'has a right to occupy the pecuniary equivalent of his share upon the non-fulfilment by the company of the promises which induced him to part with his money.' No doubt he has, but the right which a person has to rescind a contract to take shares on the ground of misrepresentation arises from the misrepresentation, not from the fact of membership. For example, if the shareholder transferred his shares to another person, the latter would have no right of action against the company. It is true that in the case of an ordinary company, where no question of misrepresentation arises, the rights of the members may have to be ascertained and adjusted by legal proceedings, but this fact does not, I submit, alter the nature of those rights. No member has an absolute right to take legal proceedings to have his share in the company's assets ascertained and paid over to him, for if a majority of the members agree to continue the business, or to go into voluntary liquidation, a dissentient member cannot prevent them, unless the court sees fit to interfere, which it will not do except in a strong case¹. The right to take legal proceedings is an incident,

¹ See the cases collected in Lindley on Company Law, 649 seq. (5th edit.).

not an essential part of the shareholder's interest in the company. If the joint tenants of land or the co-owners of a ship cannot agree as to its disposition they may have their rights adjusted by the court¹, but this does not make the interest of each joint tenant or co-owner a chose in action.

The difficulty in ascertaining what is and what is not a chose in action arises partly from historical causes, and partly from the ignorance of the ordinary parliamentary draftsman. It was a simple matter for the old lawyers to say that marriage was an absolute gift to the husband of all chattels personal in possession belonging to the wife in her own right, but that if they were in action, as debts by obligation, contract, or otherwise, the husband should not have them unless he and his wife recovered them². The difficulty arises when we come to apply this doctrine to new kinds of property which were not thought of when the old rule was formulated. As Sir W. Grant said in reference to the question whether stock belonging to a married woman remained her property if it was not reduced into possession by the husband: 'This is a species of property grown up since all these distinctions were settled in our law³.' In cases like this the lawyer has to do his best with the materials at hand. With regard to modern statutes the case is different, for many if not all of these difficulties could be avoided if a little skill and care were exercised by the draftsman. It is instructive to observe the difference between such statutes as the Bankruptcy and Bills of Sale Acts and an act drawn by a man who understands his business. The draftsman of the Bankruptcy Act, 1869 probably never heard that any question had arisen as to stocks, shares, copyrights and patents being choses in action, and the question was obviously not present to the mind of the draftsman of the Judicature Act, 1873. The draftsman of the Conveyancing Act, 1881, on the other hand, knew that the plan devised by him for transferring property to new trustees by vesting declaration would not work in the case of stocks, shares and patents, and he therefore excluded them from the operation of sec. 34 of the Act.

CHARLES SWEET

¹ As to ships, see Williams, *Pers. Prop.* 117 (14th edit.).

² Co. Litt. 351 b.

³ *Wildman v. Wildman*, 9 Ves. at p. 176.

PROOF OF FOREIGN LAW.

IN 1861 an Act (24 & 25 Vict. c. 11) was passed purporting to provide a means for the better ascertainment of the law of foreign countries. The gist of the Act is that any superior British court may remit a case, together with the questions of law arising out of the same, for the opinion of a superior court in any foreign country with which Her Majesty shall have entered into a convention for the purpose, on the law administered by it as applicable to such case. The requisitioning court shall, however, not be bound by such opinion and may return the case for further opinion or similarly consult any other such superior court.

In 1865 (Hansard, vol. 180, 3rd series, July 3) a question was asked in the House of Commons whether any convention under the above Act had been entered into, and the answer given by Mr. Layard was, that 'the subject was of considerable importance and that Her Majesty's Government had been in communication with most of the foreign Governments with reference to it; that the papers had been laid before the Lord Chancellor, but that no convention had yet been entered into.'

Since then nothing more has been done in the matter, so far as I have been able to trace, and the Act seems to be a dead letter (cf. Chitty's Statutes, 5th ed. vol. iv. p. 32). This is to be regretted. The subject has certainly not lost in importance, but on the contrary is becoming more important from day to day in direct proportion to the increase of commerce and the growing intimacy in the intercourse of nations.

At present the principal mode open to the parties of proving the law of a foreign country, nay, the only one (if we omit a few exceptional cases in which perhaps the certificate of a Consul-General or a diplomatic representative might be received in evidence), is to bring advocates practising in such country as witnesses before the court or a commission. This method will work well enough in simple cases where only one party adduces such evidence and the other party does not dispute, or attempt to disprove it. When, however, put to the test in complex cases in which fine points of law are involved and where two or more advocates are enlisted against each other and depose to opposite statements and views, its inadequacy becomes at once apparent, and it cannot fail in many

instances to prove a source of great embarrassment to the judge who has to determine between the two adversaries.

Parties requiring to prove or contest a point of foreign law will have no difficulty in finding advocates ready to embrace their respective cases and to fight them¹, as it were, without dishonesty, in the same way as the assistance of solicitors and counsel can be procured for almost any case without any suspicion of mala fides attaching to them. Such advocates will have no reason to fight shy of a cross-examination which, to a lawyer who is at all worth his salt, can have no terror—especially when conducted by a counsel who, not being versed in the foreign system of law and its intricacies, will always be at a considerable disadvantage². Now, in order to decide between such conflicting views and to determine which of the experts has construed the law rightly, no other means can be conceived, except where apparent gross logical errors have been committed, than a direct reference to that law itself. But such reference in order to conduce to satisfactory results will have to be made on the principle of *similia similibus*, and will, as to its mode, have to be congruous to the subject-matter. In other words, in comprehending and construing foreign law it will not be enough to acquire a knowledge of its rules, but the English judge will also have to divest himself of his own peculiar method of judicial thinking and reasoning and adopt the method of foreign jurists and courts in applying such rules to a given set of circumstances. This, I submit, is the only correct standard to be employed if you want to decide between two opposite statements of the foreign law, and if you really and genuinely wish to apply it. Now, are the English courts in possession of this standard? I will quote a few dicta from the books which would seem to make it at least doubtful whether that question can be answered in the affirmative.

In *Nelson v. Bridgport* (8 Beav. pp. 527, 529) Lord Langdale observes, 'With foreign law an English judge cannot be familiar . . . there is, in every case of foreign law, an absence of all the accumulated knowledge and ready associations which assist him in

¹ Wharton (Conflict of Laws, 1872, § 774) says: 'The English practice is to call as a witness a jurist. It may be objected to this usage that experts of this character when selected by the parties are often so selected either from their prejudice or from their pliability, and that the result often is that so many such experts will be found to testify on one side of a case, and with equal positiveness as has been testified on the other.' Of the inconclusiveness of such opinion an illustration may be found in a case before the English Divorce Court, '1866, *Hyde v. Hyde*, 1 P. & D. 133.' Lord Campbell (*Sussex Peerage* case, 1844, 11 Cl. & F., p. 115), speaking of such an expert, observes: 'a witness whose memory may be defective, and who may have a bias influencing his mind upon the law.'

² Even an apparent breakdown of such an expert might be due to his want of knowledge of the English language and technical legal terms, the incompetency of the interpreter and other causes, not necessarily to the badness of the cause of his party.

the consideration of that which is the English law and of the manner in which it ought to be applied in a given state of circumstances to which it is applicable.' 'The judge is constantly liable to be misled by the erroneous suggestion of analogies which arise in his own mind and are pressed upon him on all sides. These difficulties are obvious enough even in cases in which he may have before him the very words of what is proved to have been the law applicable to the events in question.' 'Whoever has considered the difficulties which frequently arise in our own courts in the investigation of English law applicable to particular cases and the mode of reasoning and investigating by which it is endeavoured to surmount those difficulties will perceive what presumption it would often, nay, generally be, in an English judge to attempt to apply the same process to the investigation of a foreign law and the consideration of its proper application to particular cases.'

'Although I think that when it (the foreign law or commentary) is produced the judge has in general no right to take upon himself the business of construing it and determining its application, yet when the passages are produced they may enable the party affected by the testimony not only to cross-examine the witness as to his own interpretation or inferences and the grounds thereof, but also to call other witnesses to the same point ¹.'

In *Baron de Bode's* case (1844, 8 Q. B. p. 265) Coleridge J. says: 'When the language (of the written law) is before us we have no means by which to construe it... for after all, if we were to attempt extrajudicially to expound that law we should be liable to the most serious errors. The question for us is not what the language of the written law is, but what the law is altogether as shown by exposition, interpretation, or adjudication. How many errors might result if a foreign court attempted to collect the law from the language of some of our statutes which declare instruments in particular cases to be "null and void to all intents and purposes," still an English lawyer would state that they were good against the grantor and that the courts have so expounded the Statute.'

In the *Sussex Peerage* case (11 Cl. & F. 114-117) Lord Brougham observes: 'but it is perfectly clear that the proper mode of proving a foreign law is not by showing to the House (of Lords) the book of the law, for the House has no organs to know and to deal with the text of that law.'

In *Di Sora v. Philipps* (10 H. L. C. 640) Lord Chelmsford says: 'It seems, however, rather questionable whether the judge has a right

¹ From this passage it would appear that in Lord Langdale's opinion books should only be produced for the benefit of the opposite party, not for examination by the judge.

to resort to the foreign law itself for information when the evidence of the witness is not satisfactory to his mind.'

Yet in spite of all these emphatic utterances tending in exactly the same direction, viz. that it is outside the province of an English judge to construe and examine into the authorities of foreign law, it seems to be settled beyond dispute that he may do so, and as a matter of fact it is constantly practised, provided only that experts have in their evidence referred to such authorities.

This practice, with the qualification mentioned, appears to have been originated by Lord Stowell¹ and was referred to by Lord Langdale, who in *Nelson v. Bridgport* observes: 'In *Lindo v. Belisario* (1795, Hagg. Cons. 216) in which the evidence taken upon the interrogatory was not clear and positive, he (Lord Stowell) thought that he should not transgress his duty if he looked beyond the evidence, but not farther than the evidence fairly led. And in both the cases of *Lindo v. Belisario* and *Dalrymple v. Dalrymple*, I understand him not to have considered any authority, opinion, or passage, not distinctly referred to by the witnesses, and so not to have looked farther than he considered the evidence to have fairly led and yet to have gone beyond the evidence in considering for himself the effect of the authority referred to with the view of acquiring for himself notions by which he might be better able to decide upon the effect of the varying or obscure testimony of the witnesses².'

Now, what does this practice placed side by side with the above

¹ Lord Brougham in his sketch of Lord Stowell (Statesmen of the time of Geo. III, 2nd ser. 76) writes: 'It is possibly hypercritical to remark one inaccurate view which pervades a portion of his (Lord Stowell's) judgment (*Dalrymple v. Dalrymple*). Although the Scottish law was of course only matter of evidence before Sir W. Scott . . . he yet allowed himself to examine the writings of commentators, and to deal with them as if he were a Scottish lawyer. . . . He (the judge) had no means of approaching such things, nor could avoid falling into errors when he endeavoured to understand their meaning, and still more when he attempted to weigh them and to compare them together. This at least is the strict view of the matter, and in many cases the fact would bear it out. Thus we constantly see gross errors committed by Scottish and French lawyers of eminence when they think they can apply an English authority.' [No modern lawyer will hesitate to prefer Lord Stowell's authority to Lord Brougham's.—ED.]

² Lord Langdale in the same judgment observes: 'A judge endowed as Lord Stowell was might perhaps safely do some things which other judges might find it very hazardous to imitate.' This seems to militate against the notion that Lord Langdale looked upon Lord Stowell's practice as an established rule, since with regard to such rule no distinction could properly be drawn between strong and less strong judges.

Another observation of Lord Langdale in the same judgment is the following: 'Though knowledge of foreign law is not to be imputed to a judge, you may impute to him such a knowledge of the general art of reasoning as will enable him with the assistance of the bar to discover where fallacies are probably concealed. . . .' To this I may be allowed to say that the law of a country being not merely a creature of logic, the reasoning alone of even the most able logician will not always avail him to arrive at results conformable with such positive law. I refer in this respect to a remark of the Master of the Rolls in *Nelson v. Bridgport* (p. 540): 'In matters of foreign law, particularly when complicated, where every party engaged in the inquiry is a mere disciple, where no adept is present,' &c.

dicta signify? It signifies that English courts, though debarred through professed incompetency from looking at foreign law books referred to by the parties—even for the purpose of deciding a simple question of foreign law—are, on the other hand, quite at liberty and competent, even on intricate questions, to examine into foreign legal authorities where the latter are referred to by witnesses in order to decide whether or not the witnesses' conclusions were right. Thus, by this ingenious process, English courts have arrived at this result that they virtually do construe the foreign law¹ and that they practise with a certain though apparently purely technical qualification that which in theory they most emphatically repudiate. It goes without saying that this mode of proceeding is not due to wantonness or exaggerated self-confidence on the part of English judges. Its justification lies in its necessity.

Lord Langdale, in *Nelson v. Bridgport*, says: 'In this as in many other instances there is room for the exercise of a sound and cautious discretion, by the employment of which courts are enabled to bring some cases, otherwise interminable, to a good and even satisfactory

¹ A very instructive illustration presents itself in a recent case, *Concha v. Murieta* (1889, 40 Ch. D. 543), in which Peruvian law was to be applied. According to the law of Peru a father is entitled to administer the estate of his infant child, and to receive for his own benefit the income during the child's minority. A father during the infancy of his daughter sold a part of her property consisting of certain bonds, by which sale a considerable loss was incurred in respect of the daughter's property. After his death the daughter claimed compensation out of his estate for the loss occasioned by this disadvantageous sale. The evidence relied on as to Peruvian law consisted of two affidavits, one by *Zevallos*, and the other by *Perla*. The former deposing to the effect that as administrator the father was authorized to sell, as long as he did so bona fide, and in the exercise of his best discretion, abilities and judgment; whilst *Perla*, on the other hand, deposed that the code of Peru placing a father administering his children's property on exactly the same footing as an usufructuary withheld from him the power of sale. Stirling J. attached greater weight to the affidavit of *Zevallos* than to that of *Perla*, and decided in favour of the father's estate. The question whether the court could look at the provisions of the code for itself was not raised by him.

The Court of Appeal, reviewing the passages of the code of Peru referred to, arrived at the opposite conclusion, and reversed the decision of Stirling J. The judgment turned mainly on this syllogism: Parents who administer the property of their children are subject to the same obligations as the usufructuary (Art. 195). The usufructuary cannot alienate the thing subject to the usufruct (Art. 1095). Ergo: the father had no right to alienate the shares. I do not feel in any way competent, nor do I wish to comment on the merits of this decision, but I think that anybody reading the report must be struck at the extreme scantiness of the materials supplied from the law of Peru. There is not a word said about any authoritative exposition, interpretation of, or adjudication on that law. And surely an authoritative voice was needed to explain that most extraordinary and rigorous proposition (if at all applicable to the case) that a father, being usufructuary and administrator, should in the latter capacity have no right, under any circumstances, as it would appear from the clause, to sell a single share belonging to the administered property. Cotton L.J. supplemented this apparent gross deficiency by saying, 'a bona fide sale for the purpose of reinvestment might well come within the power of the administrator'; but this he did from the storehouse of *English Law*; the Peruvian law, as supplied, was silent on the point. (*Perla* had made a passing remark as to the consent of the court being required, but did not refer to any authority or passage of the code.)

conclusion. . . . If the utmost strictness were required in every case justice might often have to stand still.'

Lord Denman, in the *Sussex Peerage* case, says: 'You may have to open the question on the knowledge of the witness, and other witnesses may give a different interpretation to the same matter, in which case you may decide as well as you can on the conflicting testimony.'

The judge, being under the obligation to determine the cases before him, has to make shift and decide in accordance with the materials and means at his disposal.

It is for legislation to supply him with such materials and means as will afford a guarantee of such law being really applied as was intended to be applied instead of a spurious article manufactured in an unsystematic and therefore haphazard way on the stratum of inadequate and adulterated materials, and leading to decisions which might tend to derogate from the high esteem in which English judges are held all over the world; for such decisions are sure to be commented upon in those countries to whose sphere of law the merits of the case properly belong.

It may perhaps be objected that there is no reason why foreign law being a fact in the case should be dealt with differently from other facts, and that any other treatment would fall outside the frame of our legal system.

The answer to such an objection would be, that foreign law does indeed occupy a peculiar position distinct from any other element incidental to the determination of a law-suit. In the first place it is hardly correct to say that it is a fact. Williams J., in *Baron de Bode's* case (8 Q. B. p. 260), says: 'We hear *in limine* that foreign law is to be proved as a fact. What does that mean? Is it a fact in the ordinary acceptation of the word as it is a fact that a man was seen walking in a field or riding away with a horse? It clearly means as applicable to this subject, the result which has been produced on the mind of a scientific person by his reading and intelligence in respect of the particular subject. There is thus little analogy to the proof of the facts ordinarily so called. . . . Thus it is conceded that a fact of this sort is to be proved by evidence altogether inapplicable to facts in the ordinary sense of the word.' Coleridge J. (p. 263, *ibid.*), 'We acquire a knowledge of written law in general as a fact, but a fact, as my brother Williams has stated, of a peculiar kind, a fact which can be arrived at only as a matter of science and not as a matter of mere practice¹.'

From a merely logical point it would be a misnomer to call

¹ In the same case the joint evidence of two experts on law was received contrary to the ordinary rules of evidence.

foreign law a fact and at the same time speak of applying it. You cannot say, you apply a fact to a fact—it is and remains law, whatever part may have been attributed to it by an artificial doctrine.

Another reason which distinguishes and elevates it above the sphere of the ordinary facts of a case is this, that where the judge holds that it should be applied, there it governs the case, ousts the English law, and assumes the latter's position and dignity.

There is a last circumstance which I think should not be overlooked in connexion with this point, namely that the proof of foreign law under the present mode of procedure has this practical peculiarity, that from the nature of it, the witnesses called upon in respect of it are almost invariably foreigners resident and practising in more or less remote countries. An inevitable consequence of this is that, apart from the difficulty and expenses in procuring their personal appearance, neither the courts nor the parties affected by their evidence know anything about their standing, their professional position and reputation, so that this important though extrinsic criterion for weighing and criticizing the value of their evidence, which assists so considerably with regard to other experts, will be missing in these cases. One advocate will be like the other, whatever real difference as to their experience and qualifications in general or in respect of the particular branch of the law in question there may be between them. This observation applies to the courts of first instance and still more to the Courts of Appeal. Lord Wensleydale, in *Bremer v. Freeman* (10 Moo. P. C. p. 361), says: 'It is to be lamented that, from the very nature of the case, we cannot satisfy ourselves by the personal examination of those witnesses as to the weight due to each of them, and a proper sense of professional delicacy precludes them from giving evidence as to the merits of each other. We are compelled, therefore, to decide the disputed questions with inadequate means of judging of their professional eminence, their skill and knowledge.'

In conclusion, I may say that the general terms of the Act (24 & 25 Vict. c. 11) seem to give wide scope for the drafting of conventions as well as for the discretion of English judges in availing themselves of it: so that even the evidence of experts could, as heretofore, be taken in our own courts, and might only in the event of its being unsatisfactory or conflicting be remitted to the foreign court for determination. The foreign court could then give an opinion without hearing advocates on both sides, whereby a multiplication of trials would be avoided.

JULIUS HIRSCHFELD.

THE FRANCO-NEWFOUNDLAND CONTROVERSY.

THE latest treaty on this question was concluded shortly after Waterloo¹. It confirms an arrangement made the year before at Paris, which reads as follows²:—

‘Art. 13. As to the French right of fishery on the grand bank of Newfoundland, on the coasts of the isle of that name and the adjacent isles, and in the Gulph of St. Lawrence, everything shall be restored to the same footing as in 1792.’

The year 1792, or, according to the eighth Article, ‘the first of January, 1792,’ was not chosen with special reference to these fisheries. It echoes throughout the treaty and is applied to Europe, Asia, the West Indies as well as Newfoundland. The object of the allies was to annex the dawn of peace to the year before the war, to skip the Revolutionary as well as the Napoleonic era and restore the former status.

We have to do with the second of the treaty fisheries, that which may be exercised on the coasts of Newfoundland. Its territorial limits are not disputed. Under the arrangement of 1713, they stretched north-westwardly from Cape Bonavista, passed round the northern peninsula, and descended the west coast to Point Riche at the entrance of Ingornachoix Bay. A change was made in 1783 for reasons that shall be noticed. Beginning now at Cape Ray, the south-west corner of the island, they run northwards along the west shore and pass through the Straits of Belle Isle to Cape Norman; thence they skirt the northern peninsula in a southerly direction to White Bay, turn to the east and reach Cape St. John. This strip of coast and coastal waters, known as the French or Treaty Shore, measures 425 miles as the crow flies and 790 miles if you follow low-water mark. It is as if the south and east of England, from Spithead to Hull, were affected with foreign claims.

Our first and principal question is to whom does the district belong? The Treaty of Utrecht deals with the subject affirmatively and negatively in Article 13. By way of affirmation we read in the official Latin³: ‘*Insula, Terra Nova dicta, una cum Insulis adjacentibus, Iuris Britannici ex nunc in posterum omnino erit*’; in French⁴: ‘... *appartiendra désormais et absolument à la*

¹ Paris, Nov. 20, 1815, Art. 11. ² Paris, May 30, 1814; Ann. Reg. 1814, p. 408.

³ Tract. Pac. (Gt. B. & I.), London, 1713.

⁴ Trait. de Paix (Fr.), Paris, 1713.

Grande Bretagne'; and in English: 'shall henceforth belong of right wholly to Great Britain.' The renunciation or disclaimer is no less definite: 'Neque aliquid Iuris ad dictam Insulam et Insulas, ullamve illius aut earundem partem, Rex Christianissimus, Haeredes eius et successores aut Subditi aliqui, ullo dehinc tempore in posterum sibi vindicabunt'; in French: 'sans que ledit Roy T. C. . . puissent désormais prétendre quoyque ce soit et en quelques tems que ce soit sur ladite Isle et les Isles adjacentes en tout ou en partie'; and in English: 'nor shall the M. C. King . . . at any time hereafter lay claim to any right to the said Island or Islands or to any part of it or them.' The Treaty of Paris¹ renews and confirms these provisions simply. In 1783², 'Sa Majesté, le Roi de la Grande Bretagne, est maintenue dans la propriété de l'isle de Terre Neuve . . . ainsi que le tout lui a été assuré par l'article treize du traité d'Utrecht'; or, as rendered in the translation attributed to Jenkinson and become official: 'is maintained in his right to the Island of Newfoundland . . . as the whole was assured to him by the thirteenth Article of the Treaty of Utrecht³.'

These are the contents of the treaties which were in force in 1792, in so far as concerns the ownership of the island. I know not what stronger language could be used for its assertion or acknowledgment. If it does not confer on England absolute property as against the world, it surely carries, as against a signatory to the treaties, her sovereignty in the soil and coastal waters of Newfoundland, her jurisdiction over all persons who may come within the bounds, foreigners as well as subjects, and her sole power to say what laws shall obtain there and to execute them. It should likewise follow that such claims as France may have, no matter in what part of the island, spring from England's superior right and should be construed subject to it. Modern international law would warrant us in going further and calling for the strictest proof of the existence and extent of such claims, because, in the language of Phillimore, they are 'a special and extraordinary right,' and so far as they go impair the local sovereignty. The integrity of their soil, whether at home, in their colonies or in their protectorates, is a first principle with our friends across the Channel, but somehow they do not take this short view of the status of 1792 in regard to Newfoundland. On the one hand, they demand the execution of the treaties, 'dans toute leur étendue et dans toute leur rigueur,' as is their due, though the mode of its expression is rather brusque; and, on the other, introduce considerations which lie outside the

¹ Arts. 5 and 6.

² Treaty, Versailles, Art. 4, Martens, Rec. de Trait., t. ii. p. 465.

³ Coll. of Treat., vol. iii. p. 357.

treaties to mark the extent they intend and to indicate the required degree of rigour¹.

Since the days of Chateaubriand², Kingdom, Empire and Republic have maintained that the Treaty of Utrecht is really a treaty of partition, and that its true operation is that France, once the lawful owner, ceded the island to England, and in the deed of gift reserved a fishery in 'Le Petit Nord'³, which I take to be identical with the Treaty Shore, or a district in its vicinity, as distinguished from the port called Petit Nord. A reservation of this kind would be exclusive of English sovereignty and independent of any enumeration of rights or privileges conferred by the Treaty of Utrecht or any other instrument.

Partition treaties were no rarity in the eighteenth century. In 1698 and 1700, Louis XIV had drawn up the documents which are known to history as 'The Partition Treaties.' A few years before he concluded an arrangement with James II respecting Newfoundland, which involved separate holdings and several fisheries⁴. By virtue of its fifth Article he held or continued to hold Placentia, Saint Mary's and their surroundings, if not 'Le Petit Nord.' Article 6 directs that neither power 'shall trade, fish, . . . within the precincts of the other,' and that 'if any ship be found so doing' it shall be confiscated. Now, had a partition been intended in 1713, or the reservation of a fishery on an assigned coast, is it not probable that the language of Utrecht would bear traces of it and, at the least, be as explicit as that of London? So far as I can find there is no agreement for partition, there is no assent to reservation in any of the papers of 1713. The situation is this. *A* and *B* are in contest over certain properties. They agree that Blackacre shall henceforth belong to *A* absolutely. Does this denote partition of Blackacre? Let Petit Nord be some part of its northern extremity. Does *B* reserve an exclusive right there when he abandons claim to Blackacre, abandons every pretence of claim upon it and its every part, for all time, on his own account and on behalf of those who can claim through him?

The main argument of Chateaubriand is historical and permits of several admissions. The kings of France added to the style of Canadian governors the title of Governor of Newfoundland. But Louis XIV lavished more than honours when he chose. In 1664 he gave to the Occidental Company all the West Indian Islands with what of South America lies between the Amazon and the Orinoco, and threw in 'the North American Continent from the

¹ Yellow Bk. (Paris) 1890-1, see Desp. June 21, 1886; Dec. 7, 1888; June 22, 1889.

² St. Pap. For. Rel. U. S., vol. v. p. 580 et seq.

³ Parl. Hist., vol. vii., App. No. 22.

⁴ London, 1686.

north of Canada to Virginia and Florida, together with the whole coast of Africa from Cape de Verde to the Cape of Good Hope¹. Does this confer a valid claim or enure to national ownership more than the customary rodomontade of our own early Charters? French sailors, no doubt, fished on the banks of Newfoundland, on many parts of its coast, and, if Abbé Raynal² may be trusted, in that vague region called 'Le Petit Nord,' from the refounding of Canada, if not earlier; but what of that? Spaniards, Portuguese and Dutch, according to the same authority, pursued the same industry in the same places for a longer term of years. French, English and Americans have whaled, sealed and fished on numberless coasts to which their governments never preferred claim. If you inquire as to possession and settlement, you will find, as Garneau³ says, that notwithstanding their fisheries, the French paid little attention to Newfoundland till 1660, when the Court of Versailles made its first cession or issued its first charter. Abbé Raynal thinks the issue of any charter was a mistake and the particular grantee ill chosen; but, be that as it may, the point for us is that the bounds of the cession did not reach beyond the Bay of Placentia, which became the French headquarters for fishing in North America. But Placentia Bay is at the south of Newfoundland and by the shortest way lies 300 miles from the disputed shore. Its settlement may be valid for many purposes, but does it prove a prior occupation of the island? At the date of the Star Chamber Regulations (1633) there was a substantive English population in Newfoundland. Whitbourne tells us in his Discourse (1621) how he empanelled juries, and in 170 cases dealt out a rough sort of justice to the inhabitants of St. John's, Harbour Grace, Carbonear, Ferryland, Trinity, Fermouse (Formosa), under commission from King James I. I do not find a detailed account of trade and population for 1660, but, according to the report of Capt. Robinson⁴, the then governor, there were forty-eight English settlements between Cape Race and Cape Bonavista in 1661. A few years later (1675) Sir John Berry informs the Government that the 'home' ships engaged in the fishery numbered 175, with 688 boats, carrying 4,309 men, and having a total catch valued at £116,272, and compares it with the local industry--which had 277 boats with 1655 'residents,' and a total catch worth £46,813, 'upwards of one-third of the fish taken by the Merchant Adventurers⁵.' These settlements stood between Placentia and the reputed Petit Nord. In the absence of charter, cession or continued occupation, the district would fall to

¹ E. Lareau, *Hist. du Droit Can.*, t. i. p. 494.

² *Hist. Phil.* t. viii. p. 196.

⁴ *Calen. St. Pap. (Col.)*, 1661-8, No. 1729.

³ *Hist. du Can.*, t. i. 360.

⁵ *Ibid.*, 1675-6, No. 665.

the English rather than to the French. In regard to Petit Nord, no charter, no cession is adduced and no continued occupation is shown.

Conquest is invoked to support the reservation theory. Here we may fairly take the representation of Garneau¹, who cannot be accused of prejudice against France and is not wont to minimize her exploits. He says that in the winters of 1696-7, 1703-4, 1709-10, organized expeditions, composed of French settlers, Canadians and Indians, set out from Placentia to subdue the island; that on each occasion they overran the greater part of it, including St. John's and Ferryland, but were as often repulsed from Carbonear and Bonavista; and that on approach of the English fishing fleet in the early spring of each year, they abandoned both booty and prisoners, and took refuge behind the fortifications of Placentia. These were raids, not conquests. He adds significantly that 'if France had been mistress of the seas the whole island would have passed under her domination.' Captain Mahon has made it very plain that command of the sea determined the empire of the West. From 1710 till the drawing up of the treaty there was neither raid nor attack, so that 'the attempt and not the deed confounds' the argument from conquest.

The form of Article 13 is supposed to countenance the French claim, because it does not negative a prior occupation by France directly. But the argument, it seems to me, may be applied with greater force on the other side. If France had had prior occupation, should we not have found in the treaty sufficient words of conveyance applied to the whole island, as give, yield, surrender, grant or cede? Thus, in 1763 France cedes Canada to England, and England cedes to France the islands of Saint Pierre and Miquelon². The fact that she does not cede the island is good reason for saying that France was not the owner of it. But she does cede a part of it, that portion, namely, which she held or claimed. The arrangement of Article 13 is as follows: (1) Newfoundland shall belong to England absolutely; (2) 'to this end the town and fortress of Placentia and whatever other places in the said island are in the possession of the French (*'la ville et le fort de Plaisance et autres lieux que les Français pourroient encore posséder dans ladite Isle'*) shall be yielded and given up within seven months' (*'cedentur et tradentur,' 'fera remettre'*); (3) the abnegation clause given above; and (4) certain prohibitions and permissions to be examined further on.

It would appear that the French possessions were a disturbing element in Newfoundland, and figured largely in her history; it

¹ Hist. du Can., t. ii. p. 35 et seq.

² Treaty of Paris, Arts. 4, 6.

would appear, likewise, that they covered no portion of 'Le Petit Nord.' In return for the release of certain Huguenots from the galleys, Queen Anne allowed the French fishermen to sell their establishments on the island, and the sales took place accordingly. The purchasers held their bargains as private property; in other words, refused to throw them into the common stock or lay them open for the first comer in spring as by law and custom was required. Thereupon arose a long-continued and bitter conflict, that occupies many pages of Reeves' History¹, between the 'free-fishery' men, who invoked the statute 10 & 11 Will. III. c. 25, and the 'monopolists,' 'disturbers,' 'interlopers,' who could vouch only the Order in Council but were supported by the admiral on the station. The Lords of Trade and Plantations found themselves besieged by both parties; their counsel pronounced the sales void and the Order illegal; and the feud was assuaged at length by severing those districts wherein the sales took place from the Newfoundland administration and annexing them to Nova Scotia. Again, by the Quebec Act (1774), Labrador, which had become British under the Treaty of Paris and been given to Newfoundland, was transferred to Canada because private rights in land had accrued there also under capitulatory sales. Had the French had any establishments worth selling in any portion of 'Le Petit Nord,' we may fairly assume that they would have been sold, that private rights would have accrued, that 10 & 11 Will. III. would have encountered the same resistance there as in Placentia Bay and the Labrador, and that a like transference would have taken place. But at no time was the Treaty Shore of 1713, or the Treaty Shore of 1783, or any portion of either of them, severed from the Newfoundland Government. To those who argue that it is open to France to rely on simple discovery, mere landing, raising of marks, temporary occupation as warrants of title, it is sufficient to answer (1) that she began her explorations long after the discovery of the island by Cabot, and (2) that to gain access to the New World she formulated under Francis I a rule that is now generally accepted as international law, and is well expressed by Roynéval² in these words: 'il faut, de plus, des établissements sédentaires et permanents'; besides discovery, &c. there must be sedentary and permanent establishments. 'Le Petit Nord' was not severed from the Newfoundland administration, because no private holdings were acquired; no private holdings were acquired, because no sales took place; no sales took place, because there were no French establishments to sell; without establishments permanent and sedentary there could be no French

¹ Hist. of Newfoundland, pt. 2.² Instit. du Droit de la Nat. et des Gens, p. 154.

possession, no national title, and no reservation of an exclusive fishery as part of that title.

The reservation theory is essentially modern, and suffers nothing in the hands of M. Ribot or M. Waddington. But its object, the vindication of an exclusive right for French citizens within the treaty bounds and the introduction of French jurisdiction to secure that right, is old and crops up continually in the diplomatic correspondence of the last 130 years. M. Sandeau 'infers' the exclusion of the English 'from the mere wording of the thirteenth Article of the Treaty of Utrecht'.¹ The best expression of this view will be found, I think, in the so-called Treaty of Commerce which Louis XVI made with the revolting colonies of England in 1778. Its tenth Article provides²: 'Les Etats-Unis, leur Citoyens et Habitans ne troubleront jamais les Sujets du Roi T. C. dans la jouissance du droit de pêche sur les Bancs de Terre-Neuve, non plus que dans la jouissance *indéfinie et exclusive* qui leur appartient sur la Partie des Côtes de cette Isle désignée dans le Traité d'Utrecht.' The word 'indéfinie' I take to mean unrestricted, unlimited, and not merely 'general,' as M. Flourens³ would infer. The French claim under the treaty would then be for an unrestricted and exclusive enjoyment of the fisheries which lie within the prescribed limits.

Now what are the provisions of Utrecht which deal with the right of fishery? They are directed 'to the subjects of France' ('Subditis Gallicis,' 'ausdits Sujets de la France'), not to the king nor to the country. They are mandatory injunctions: 'it shall not be lawful for,' 'it shall not be permitted to' ('nec . . . illicitum erit,' 'neque . . . permissum erit,' 'il ne leur sera pas permis'). So far as they can be considered rights, they take effect by way of exception to prohibitions. French subjects shall not

- (a) 'fortify any place in the said island';
- nor (b) 'erect any buildings there besides stages made of boards and huts' ('praeter contabulationes et turguriolæ,' 'des Echaffauts et Cabanes');
- nor (c) 'resort to the said island (dictam insulam . . . frequentare) beyond the time necessary for fishing and drying fish';
- nor (d) 'catch fish and dry them on land' ('piscaturam exercere et pisces in terra exsiccare,' 'de pêcher et de sécher le poisson') except between Cape Bonavista and Point Riche.

I fail to see wherein this arrangement confers any national jurisdiction on France or her king, or gives an exclusive or unrestricted right of any kind to her nationals. It may permit her subjects, by

¹ Revue des Deux Mond., 3^{me} Pér., t. 6. p. 13c.

² Martens, Rec. des Trait., t. i. p. 690.

³ New Review, July, 1890, p. 40.

way of exception to the ideas of alienage then prevailing, to come within a specified portion of British territory and exercise a particular industry there; but it allows this only under special conditions and subject to defined limitations. It does not and does not pretend to exclude the English, for the whole island is theirs: its object is to admit the French. Any collection of treaties will give you many similar cases. Thus, under the Convention of 1818¹, the people of the United States may fish in the waters of the Labrador. Are Newfoundlanders therefore excluded? They may also land and 'cure their catch on unoccupied places,' and bargain with the owners for the use of 'places occupied.' Does this prohibit British subjects from resorting thither and pursuing the same industry in the same way? Or does it prevent Labrador residents from casting a seine in their own waters and preparing their haul for market on their own holdings? Under the French system of interpretation, it would import likewise the jurisdiction of the United States and oust the sovereignty of the grantor.

Much correspondence has passed and many resolutions been framed in French and English on the question, What is the content of the word 'fish' (*piscis*, *poisson*) used in the thirteenth Article? Does it include salmon, herring, halibut, or codfish only? According to Abbé Raynal, 'morue' (codfish) is the only thing that makes Newfoundland interesting. An agreement² is concluded between the nations to determine by arbitration whether the term extends to lobsters, whether 'fishing and drying fish' fairly comprehends 'the catch and preparation of lobsters,' and whether a power conferred in 1713 'to erect buildings necessary and usual for drying fish' justifies the erection of canning factories and lobster-plant. I do not wish to anticipate the award of the arbitrators in any way; but, let me ask, how is Newfoundland interested in contesting the points raised? So long as her old law regarding aliens obtained, so long as she forbade them to acquire, hold, and transmit landed property, the question had practical importance. But since 1884 any Frenchman or other foreigner can obtain land on the island on the same terms and deal with it as freely as a natural-born subject. Sir William Whiteway estimates the present value of the French establishments between Cape Ray and Cape St. John at £35,000. Wherein can it prejudice Newfoundland if that capital be increased ten or twenty times, or the industries prosecuted with it be diversified no matter to what extent, so long as her jurisdiction is maintained? On the other hand, how can she prevent the operation, except by reverting to

¹ Conv. Gt. B. & U. S., Art. 1.

² B. Bk. N. F. Fisheries (Fr. No. 2), 1890-1, p. 94.

eighteenth-century ideas and re-imposing her old law against aliens? It may be a question for French investors whether they should expend money on a foreign shore and under another jurisdiction than their own; but, I imagine, Newfoundland's advantage lies in facilitating the process by every means within her power.

In one event, but that improbable, the arbitration proceedings may become more than academic. Article 4 deals with 'subsidiary questions' on the text of which the Governments shall have agreed. If you ask what manner of questions these are to be, you receive no answer from the Parliamentary debates or the declarations of English ministers. But M. Ribot tells the Senate that the Article was introduced at the instance of his Government (*à notre demand*) so as not to bar all matters of detail, and that one such matter only is contemplated or could be entertained, namely, '*quelle est l'étendue de la zone sur la quelle pèsent nos droits à l'encontre l'Angleterre*'; our rights as against England, what zone do they cover? However interesting it may be to know that the sovereignty of the Treaty Shore is a mere matter of detail, subsidiary to the 'catch and preparation of lobsters,' a previous question arises: May not the men of St. Malo pursue the crustacean in Newfoundland waters without creating zones or having zones created for them, without imposing their jurisdiction on the island? When the text of the submission is forwarded, I should not wonder but the English minister of the day will show that this item was settled long since and so definitely that no court of arbitrators can make it plainer, and will point to France's abandonment of all right and claim to right, of all zones and claim to zones, within Newfoundland for all time under the thirteenth Article of the Treaty of Utrecht.

We are next told that subsequent treaties enlarge the French rights. The first adduced is that of 1763, article 5¹ of which says: 'The subjects of France shall have the liberty of fishing and drying (*auront la liberté de la pêche et de la sécherie*) on a part of the coasts . . . specified in the thirteenth Article of the Treaty of Utrecht, which is renewed and confirmed (*re-nouvelé et confirmé*) by the present treaty.' Is this an enlargement? The only word notable is 'liberty.' In 1713 we had permission or allowance. But if 'right' had been used, what difference would it have made? The next, which is the last treaty before 1792, takes its name from Versailles². Its fifth Article changes the limits and adds: 'French fishermen shall enjoy the fishery (*jouiront de la pêche*) which is assigned to them by the present Article as they had the right to

¹ Martens, *Rec. des Trait.*, i. p. 33; Jenkinson, vol. iii. p. 182.

² Martens, *Rec. T.*, ii. pp. 465-6; Jenkinson, vol. iii. p. 257.

enjoy that (comme ils ont eu droit de jouir de celle) which was assigned to them by the Treaty of Utrecht.' The treaties contain nothing further on the question of right, but where is the enlargement? Everything is referred back to the Utrecht arrangement. If that instrument had contained only a bare avowal of England's sovereignty and a mere abnegation by France; if French fishermen might occupy the shore permanently, fortify and erect substantial buildings; if they might form 'établissements sédentaires' while the English, as we shall see, were forbidden so to do under 10 & 11 Will. III; an arguable case might arise to support the present demand of France. But Bolingbroke and Prior, whatever mischief they may have done, provided expressly against this danger.

The royal instructions¹ issued to the Newfoundland governors for the regulation of the Treaty Shore are very precise. They are to exercise the utmost diligence (1) to prevent any lands, rivers, islands between Cape Bonavista and Point Riche being taken possession of as private property, (2) to prevent the formation of any fixed establishments that might prejudice the French fisheries, or (3) render ineffectual the instructions that the ships of both nations should choose their stations as they arrive, conformably to the provisions of 10 & 11 Will. III. Count Vergennes made complaint that the French industry was interrupted by the erection of establishments; whereupon Lord Stormont sent him a copy of these instructions, which he accepted as satisfactory². Up to that date, which is 1776, there was a fishery of both nations within the treaty-limits, called by the English a 'floating,' 'free' or 'ship fishery,' and by the French 'une pêche errante.'

The terms laid down at Utrecht are not changed in the body of any treaty, but we are told that certain enlargements of the French right took place under the English Declaration attached to the treaty of 1783, under the Acts of Parliament passed to carry the treaties into effect, and under proclamations issued by governors of Newfoundland. We shall take these in connexion with the reasons assigned in the Treaty of Versailles for altering the limits. The operative clause for this purpose is: 'His M. C. Majesty, in order to prevent the quarrels that have heretofore arisen between the two nations of England and France, consents to renounce' the fishery between Cape Bonavista and Cape St. John on the northern shore. He is compensated by an extension on the western coast from Point Riche to Cape Ray. The quarrels referred to are those to which Count Vergennes called attention in 1776. The two

¹ Bd. Trade & Pl., May 6, 1765, entries H. 435.

² See Reeves' Hist., p. 130; also Desp. Stormont to Vergennes, Vergennes to Stormont, extracted in Statement annexed to Desp. Salisbury to Waddington, July 9, 1889; Yellow Bk. 1890-1.

courts agree that from some time after 1763 there had been going on throughout the renounced coast a triangular competition which resulted in a triangular duel. There was an English floating fishery favoured by English law, a French floating fishery favoured by French law and treaty, and a local or sedentary fishery, at times encouraged by the skippers of both nations, but in the long run antagonistic to the interests as well of the English as of the French. Prohibition of settlement, threats of expulsion, denial of landed property, denial of justice had been tried to crush it, and persistently tried, but in vain ; so that, in 1783, there was no alternative but to remove the treaty limits. This end was effected by Article 5.

The published papers¹ tell us that Count Vergennes made a strong effort to carry out the traditionary policy of France and obtain sole enjoyment of the new limits, first by an express clause in the treaty, then by a like clause in the English Declaration. Succeeding in neither attempt, he prefaced his draft acceptance of the English proposals with these words : 'as to the *exclusive* fishery on the coasts of Newfoundland.' His dropping of the word 'exclusive' may not determine this controversy as against France, but it militates against her claim. On the other hand, if he had insisted on its retention, and if the Duke of Manchester, as he was in that event instructed, had made a second declaration to bar the constructive inference, no consistent meaning could be extracted from the declaratory provisions of 1783, and we should be thrown back on the words of the treaty given above.

'The cause of quarrel,' the sedentary fishery from Cape Bonavista to Cape St. John, having been eliminated from the body of the treaty, the English declaration propounds its purpose 'to prevent even the least foundation of dispute for the future.' Its means are contained in paragraphs 2 and 3, with which His Majesty of France declares that 'he is fully satisfied.' The first sentence of paragraph 2 bears evident marks of the fray from which it sprang and reads as follows : (a) 'to this end [as above quoted] and (b) in order that the fishermen of the two nations may not give cause for daily quarrels, H. B. Majesty will take the most positive measures for preventing his subjects from interrupting in any manner (*ne troubler en aucune manière*), by their competition, the fishery of the French during the temporary exercise of it which is granted to them on the coasts of Newfoundland ; and (c) he will, for this purpose, cause the fixed settlements which shall be formed there to be removed' ('*et elle fera retirer, à cet effet, les établissements*

¹ Statement in Desp. *Salisbury to Waddington*, July 9, 1889; *Fitzmaurice, Life of Shelburne*, vol. iii. 260, 288, 318-9.

sédentaires qui y seront formés'). Three interpretations have been evolved: (1) the limits shall be kept free from fixed establishments, English and French; (2) English establishments shall be removed in case and in so far as they interfere with or interrupt French fishing; (3) English establishments shall be removed in any event. Construction marked (2) has found most favour among the English. Clauses (b) and (c) are then taken to form a double apodosis. French authorities have fluctuated between interpretations (2) and (3). Number (1) receives much support both from law and history, and requires that clause (b) be read as an amplification of clause (a). If the whole sentence be construed in the strongest sense against the English and not, as modern law would require, against the claimant; what then? Does it give the French the right of setting up 'établissements sédentaires' or the power of exercising what they now call 'predominant control'? The second sentence of paragraph 2 is a police-provision, and says that the King of England 'will also give orders that the French fishermen be not incommoded (ne soient pas gênés) in cutting the wood necessary' for repairs.

Paragraph 3 is directed to both parties. (1) 'The thirteenth Article of the Treaty of Utrecht and the method at all times acknowledged shall be the plan upon which the fishery shall be carried on there' ('sera le modèle sur lequel la pêche s'y fera'), that is, within the new limits, between Cape Ray going by the north and Cape St. John. (2) 'It shall not be deviated from by either party' ('on n'y contreviendra pas, ni d'une part ni de l'autre'). What a pretence is it then to say that the English are to be excluded from the bounds? (3) By way of elaboration we have, on one side, the French (a) 'building only their scaffolds,' (b) 'confining themselves to repairs,' and (c) 'not wintering there'; and, on the other, the English (a) 'not molesting them in any manner' ('ne molestent aucunement'), (b) 'nor injuring (ni ne dérangeant) their scaffolds during their absence.'

The provisions of the Treaty of Utrecht are already given; what then is 'the method at all times acknowledged' ('la méthode de faire la pêche qui a été de tout tems reconnue')? The older history of Newfoundland is an answer to the question. In form of law, it is 'the ancient custom' stereotyped by the Star Chamber (1633), amplified by 'The Additional Regulations' (1670), perfected by 10 & 11 Will. III. c. 25 (1697), and repealed in 1824. You will find it described as a practical system in Whitbourne's Discourse (1621) and in Reeves' History (1793). Mr. Hatton has cast the glamour of his imagination round it in his novel 'Under the Great Seal.' The most graphic representation of it comes from Mr. Knox, who, as Under-Secretary of State and later as Merchant Adventurer,

had much to do with Newfoundland. He was called before a committee of the House of Commons in 1792 to state the policy of the laws relating to the island, and said¹: 'Newfoundland had been considered in all former times as a great English ship moored near the banks for the convenience of English fishermen. The Governor was the ship's captain, and those engaged in the business were his crew, subject to naval discipline when there, and bound to return to England at the end of the season.' If you substitute France for England, French for English, you get the French conception of the plan of fishery pursued in Newfoundland. The Marine Ordinance condenses the Star Chamber Regulations². The method is therefore common to both nations, and is well described as 'acknowledged at all times.' It provides for an annual migration to be followed by an annual return, for an open or free fishery, a ship fishery or *pêche errante* as distinguished from a sedentary fishery, for temporary not permanent holdings, temporary not permanent buildings. But these are, as we have seen, the provisions of the thirteenth Article of the Treaty of Utrecht. There are, then, not two plans but one plan to obtain within the new limits and to be equally enjoyed by French and English.

The action of both nations has since confirmed this view. It runs throughout the negotiations and correspondence of England. Newfoundland inherited and now holds it. It is the interpretation which this country professed to the United States in 1818³, when she gave their citizens the right of fishing within that portion of the new limits which lies between Cape Ray and the Quirpon Islands 'for ever in common with British subjects.' France is bound by it indirectly. In the season of 1821-22, she warned off certain United States schooners and forbade them to fish within the district mentioned; whereupon there passed a brisk correspondence between Count Chateaubriand and Mr. Gallatin, which is supplemented by Mr. Rush⁴. As result, the notice given was allowed to drop, and American fishermen from Gloucester and other ports have since resorted regularly to the coast without interruption.

But it is said that French rights as against British subjects are enlarged by the Acts of Parliament passed to carry the treaties into effect. If it were so, it were a grievous fault of the Legislature. There are two Acts⁵: one dated 1788, five years after the Treaty of

¹ See Evid. in Rept. H. of C. Newf. Fisheries, 1793.

² Ordon. de la Mar. du Mois d'Août, 1681, Liv. v. Tit. vi.

³ Convention, Art. i.

⁴ St. Pap. U. S. For. Rel., vol. v. p. 508 et seq. *Rush to Gallatin*, Oct. 1, 1822; Rept. Aug. 12, 1824.

⁵ 28 Geo. III. c. 35; 5 Geo. IV. c. 51.

Versailles; the other 1824, nine years after the general peace. The first recites the treaties and declarations in full and provides for their execution simply. The second deals with many subjects, repeals a number of Acts, among them 10 & 11 Will. III, consolidates others, and directs how the island shall be governed. It does not recite the treaties, but provides for the carrying out of such as 'are now in force between His Majesty and any Foreign State or Power.' Two foreign nations were then interested in the western fisheries of Newfoundland. Both Acts authorize the issue of Orders in Council and, 'in case it shall be necessary' for the due execution of the treaties, the destruction of stages, flakes, &c., and the removal of persons. Neither of them empowers naval officers to hit off their own bat, commits the regulation of the shore to their discretion, or exempts them from responsibility for their actions. Both direct trial before the courts at St. John's or Westminster, in case the treaty provisions be infringed, the penalty on offenders under the older statute being £200 and under the later £50. The second does not purport to revive the first, which had fallen with the treaty more than a quarter of a century before. It may be questionable whether the later statute revived or was intended to revive the declaratory provisions of 1783 as part of the situation of 1792, in so far as British subjects are concerned, because it repealed 10 & 11 Will. III, which gave the English 'model' the force of law. The chief point for us is that both statutes recognize the competency of the local courts to decide all questions that may arise under the treaties and to adjudicate on the action of the naval officers.

Two proclamations of Newfoundland governors are cited; one dated 1822, the other 1827. The first may be dismissed because it is put forth 'in pursuance of the Act of Parliament in that behalf,' while in 1822 there was no such Act. The second is regular and bears the name of a governor distinguished in colonial annals, Sir Thomas Cochrane. It purports to be issued on a report of outrages committed on the French and their property, threatens offenders with 'the utmost penalty of the law,' and authorizes French as well as English officers to apprehend and bring to justice at St. John's 'all persons detected committing such offences.' No trial was had under either Act of Parliament or in pursuance of either proclamation. The outrages may have ceased or the reports may have been exaggerated.

The declaratory provisions, the Acts of Parliament, the proclamations were all framed to foster the ship or model fishery within the treaty limits. But a fishery has sprung up which is sedentary, and France calls on England to put the removal clause in operation as against British subjects. To this demand many

answers are returned, two or three of which may be of general interest.

1. Neither England nor her colony has taken active steps to encourage settlement. While the island remained under her control, England did what in her lay to prevent its being peopled, and since that time has kept this particular district, to use Lord Salisbury's expression, 'in a state of siege.' I do not question Newfoundland's jurisdiction and responsibility, but, so far as I can learn, she has neither governed nor been permitted to govern the Treaty Shore. She has not surveyed it, cannot grant a clear title to an acre of it, and does not profess to give security of tenure from Cape St. John going by the north to Cape Ray. Her attempts at collecting customs dues have constantly been foiled, and her administration of justice has been negative rather than satisfactory. The weightiest charge that can be brought against England and her colony in regard to this shore is that they have accepted a state of facts not of their own choosing, and, in deference to French susceptibilities, have refrained for too long time from interfering with a condition of lawlessness which is not creditable to either of them. They have been wanting in their duty to their own people rather than towards France.

2. The French are themselves responsible for what English settlement there is within the treaty limits. I do not say that from the breaking out of war till the re-imposition of the foreign right, from 1792 till 1815, no Newfoundlanders, Nova Scotians or others made their homes within the bounds, a law unto themselves; but accept the statements of M. Sandeau¹, who knew the region well, of M. Flourens² and M. Waddington³, that in the early years of this century the district was practically desert, and that settlement, the settlement complained of, was begun and developed in connexion with the '*établissements sédentaires*' which the French fishermen put up. These owed their existence to bounty laws of the later Kingdom, Empire and Republic. It is well known that Louis XIV's bounties fell in the general crash of privileges that makes August 4, 1789, memorable. But with the peace a new and more formidable regime was inaugurated. The system grew step by step until the national will obtained full expression in the law of 1851⁴, which, renewed from time to time and reinforced in 1881, was in 1891 continued till 1901⁵. The French were confined by treaty and declarations to scaffolds and huts with temporary possession; but, ignoring these, they took firm hold in late years of

¹ *Revue des Deux Mond.*, 3^{me} Pér., t. 6, p. 136.

² *Desp.* July, 1889; Dec. 31, 1890.

³ *B. Bk.*, N. F. 1890-1, p. 22.

⁴ *New Rev.* 1890, p. 44.

⁵ *Sabine, Fisheries*, pp. 34-5.

the Treaty Shore. They divided it into sections of the first, second and third series. Within each series they allotted 'places' to be held for five years, and at the end of each quinquennial period to be raffled for in Saint Servan and Saint Malo. To each series they attached bounties, and as a condition of the bounties prescribed the character and tonnage of the ships to be used, the number of men to be employed, the buildings to be erected, and fishing appurtenances to be supplied. In 1857¹ there were 71 harbours occupied and 133 'places' assigned. Their establishments, valued in 1890 at £35,000, and giving employment to 12 vessels, were then much more considerable and engaged 300 decked ships. The English were sought for as caretakers of buildings during winter, repairers of boats, nets and outfit, hewers of wood and drawers of water for their masters, who, in the exercise of what they now call their 'predominant right,' supplemented their scanty wages by grants of fisheries. The residents had grown to 3,500 in number by 1857. Now, the question is not whether France is pleased or displeased with the result of her labours, whether the process has been beneficial or the reverse to Newfoundland, but whether this country or the colony is bound to ensure France against the consequences of her own policy, to indemnify her for her own wrong²? It seems to me that our friends across the Channel are asking a great deal, and do not improve their case when they add that these 'foreigners,' the residents whom they would remove, whose nets and fishing tackle the French navy are instructed to seize and confiscate, have increased more rapidly under their no-government than many peoples under the best recommended system, 350 per cent. in 40 years.

There are now on the Treaty Shore 12,000 persons all told. What are you going to do with them? Expel them; in order to plant a French population in their stead, three families to every mile of coast, to be fostered under the currency of the bounty laws? A project of the kind will be found in the Conventions of 1857 and 1885. Newfoundland has hitherto warded off this danger from British North America. Canada owes it to her that the avenues of the Gulf, the gateways of the St. Lawrence, are not under the control of a foreign power. But if a French people is not brought in, what prospect have you? Shall there be no ingathering of a second English population under the present stimulus? While the bounty system continues, the experiment of expulsion and re-peopling may go on indefinitely.

¹ N. F. Journal, App. I. Reports of Kelly and Prendergrast.

² See Desp. Waddington to Salisbury, July 25, 1887.

Let us admit the legality of the French demand for a moment. A doubt may then arise whether the English establishments are removable unconditionally or on condition proved in each case by trial. But how about the establishments of France, the 'établissements sédentaires' now within the limits? They get no countenance from the treaties, none from the declarations, none from imperial statutes, none from local laws. They are illegal in any view of the question, lie open to summary proceedings or action by way of ejection. France has so often threatened to oust 'the foreigners' with a high hand that we can scarcely refrain from asking how she would like the tables to be turned. What if the treaties and declarations were executed against her 'in all their extent and in all their rigour'?

But the 'model' of the treaties and declarations is scarcely possible in the nineteenth century. Among other things it implies, on one side, the most absolute communism known to modern law; on the other, the government of a people by naval discipline, intermittently applied. In so far as Eastern Newfoundland is concerned, the system fell of its own weight in 1824. The proceedings of the French themselves have made its continuance impracticable within the treaty limits. What remains then of the old treaties that is executable to-day? what rights may the French fishermen enjoy by virtue of them? This will be the main question to be dealt with by the new court to be established either under colonial or imperial law. Their right and measure of right, I imagine, will be found to be very similar to those which the citizens of the United States enjoy on the Labrador coast under the Convention of 1818. From our point of view fisheries may be said to be of three kinds, and to be distinguished according to the use made of the shore. First, there is a mere ship-fishery without occupation of land. This is open to the nationals of both, those of the United States taking fish 'of every kind,' the French, it would seem, being restricted to those kinds which in 1783 or 1713 were usually dried. Next, there is a fishery which makes temporary use of the land. 'Unoccupied places' may be used by the citizens of both Republics; both may bargain for the use of 'places occupied.' Thirdly, there is the sedentary fishery to which the others lead in the long run. It uses the land not casually but permanently, and as a basis of operations. It is not open to the fishermen of either France or the United States under existing international arrangements. The question of its opening is one of policy for Newfoundland. She is not interested in promoting a foreign industry, but she is much interested in the developing of her own shore and coastal waters. In this point of view, if

further legislation should be desired, it might be well to legalize by special Act all French holdings now between Cape St. John and Cape Ray, to hold out inducements to the fishermen of that nation to settle within the island, granting them as free access to the land, as full use of the coastal waters, as large a measure of civil rights, and as perfect protection for person and property as Newfoundlanders now have or may hereafter obtain.

T. B. BROWNING.

FORMS OF MERCANTILE CONTRACTS¹.

A PERUSAL of the opening sections (sections 1 to 15) of the Sale of Goods Act, 1893, will give a clear indication of the important requisites for a valid contract for the sale of goods. There must be (1) a seller and a buyer, both having legal capacity to buy and sell; (2) a mutual agreement to buy and sell; (3) a thing sold; (4) a price express or implied; and (5) contracts for the sale of goods of the value of £10 or upwards are not enforceable by action unless the buyer (*a*) accepts part of the goods so sold, (*b*) gives something in earnest to bind the contract or in part-payment, or (*c*) unless some note or memorandum of the contract be signed by the party to be charged or his agent in that behalf.

In the ordinary case where *S*, the seller, sells goods to *B*, the buyer, and *B* acknowledges the contract in writing, there is no difficulty. *S* holds *B*'s 'Bought Note,' 'I have this day bought from you,' and can bring an action against *B* on it if necessary. *B* holds *S*'s 'Sold Note,' 'I have this day sold to you,' and can bring an action against *S* on it if necessary.

But when one or more brokers between the seller and the buyer are concerned in the sale the matter becomes more complicated. Take the case of the broker acting both for buyer and seller and receiving his commission from the seller. If the broker makes his contracts carefully, that is, sends out a bought note to the seller, 'I have bought from you for my principals,' and a sold note to the buyer, 'I have sold to you for my principals,' the contract is valid between buyer and seller. The seller holds a document which binds the buyer as it is signed by his agent, and the buyer holds a document signed by the seller's agent which binds the seller.

Sometimes the broker contracts as a principal. Sometimes he does not send his principal any contract at all, but merely an advice note stating the terms of the sale or purchase. He tells his principal in effect, 'I as your agent have bought for you 100 bales of cotton,' or, 'I have sold for you 100 bales of cotton,' as the case may be.

These advice notes are clearly not contracts sufficient to satisfy

¹ Taken from a series of six lectures on Mercantile Contracts, delivered at University College, Liverpool, November and December 1894, under the auspices of the Board of Legal Studies, Liverpool.

the fourth section of the Sale of Goods Act. They are not notes or memoranda of contracts signed by the party to be charged or *his* agent. They are merely statements by an agent to his own principal of the mode in which he has executed a commission for his principal.

In cases of the sale of goods, having regard to the statute, it is the duty of the selling broker when acting purely as a broker to hold some document containing the terms of the contract signed by the buyer or the buying broker, and it is the duty of the buying broker to hold some document signed by the seller or the selling broker.

There is a difference between sales of goods and sales of shares or stock which it is well to notice in passing, as otherwise some confusion may possibly arise.

As regards contracts on the Stock Exchange there is no Act of Parliament which requires contracts for the sale of stocks, shares or debentures (shares in Joint Stock Banking Companies or Bank of England Stock excepted) to be in writing.

Therefore on the Stock Exchange it is not so necessary for a principal to see that he or his buying broker holds a contract signed by the seller or selling broker and vice versa. The contract for the sale of £1000 L. & N. W. Railway stock may be made between two stockbrokers by word of mouth, and consequently the usual document which the client who is the real buyer or seller in the transaction gets on the purchase of stock or shares is merely an advice note by his broker to say that he has bought or sold the shares *for* him—subject to the rules of the Stock Exchange, which give the broker buying or selling for the principal a right to buy in or sell out as against the broker or jobber from whom he, the broker, has bought or sold. But the client usually relies, and may safely rely, on his broker to get delivery of the stock for him. He is quite satisfied that his broker will get the stock or the price of it as the case may be.

A merchant either makes his contracts direct or through a broker, and so far as regards parties to the contract the forms in common use may be reduced to the four set out in the Appendix to this paper.

The first form is that used in cases where both parties contract as principals and is No. 1 in the Appendix.

Take the sold note first: it will not take long to go through it, and a concrete example is the best way of illustrating the points I wish to make.

It is addressed to the buyers and runs to the following effect—

‘We have this day sold to you so much produce, to be paid for

at such a price in cash on or before delivery if required, the produce to be delivered say ex warehouse into buyers' carts on say the 10th proximo and the contract is expressed to be made subject to the Rules, Bye-Laws and Regulations of the Blank Association whether endorsed hereon or not, or, as is sometimes put, Customary allowances and Public Sales Conditions.'

Then follow any special conditions, and the contract is signed by the sellers.

The rules of the different Trade Associations vary according to the customs of the different trades.

Four important points, however, are almost invariably dealt with. These are—

- (1) The effect of Bankruptcy on the Contract.
- (2) The incidence of the fire risk.
- (3) Weekly settlement of differences, and
- (4) Arbitration.

Generally it may be taken that under these Trade Rules the Bankruptcy of either party to the contract gives to the other the right to close the contract at the market price of the day.

That risk of fire remains with the seller until delivery of the goods to the buyer. This is an alteration of the law by which the risk passes when the property passes and not necessarily on delivery.

And that an arbitration clause is inserted providing that all disputes shall be referred to some member or members of the particular trade to be appointed in case of difference by the President or Vice-President of the Trade Association.

A right of appeal is frequently given from the first arbitrators to a second tribunal, which is variously constituted in the different trades.

A full analysis of the various rules is not practicable, and I have only thought it necessary to indicate general principles.

The bought note must correspond exactly with the sold note. It is addressed to the sellers and commences—

'We have this day bought from you so much produce, to be paid for at such a price in cash on or before delivery if required, the produce to be delivered say ex warehouse into buyers' carts on say the 10th proximo, and the contract is expressed to be made subject to the Rules, Bye-laws, and Regulations of the Blank Association whether endorsed hereon or not.'

Then follow any special conditions which must correspond to those in the sold note, and the bought note is signed by the buyers.

In this form of contract both parties contract as principals. The two documents together constitute the contract. The seller

can bring an action against the buyer on the bought note, and the buyer has equal rights against the seller on the sold note.

In the simple case I have just given there are only two parties to the contract.

More frequently, however, a broker is concerned on one side or the other. This gives rise to a second form of contract—the broker's contract—in which the broker, if the contract is properly made, incurs no personal liability, takes a commission and merely acts as agent in forming the contract between the buyer and the seller. In such a case there are or may be four parties—the seller, the selling broker, the buying broker and the buyer.

The selling broker and the buying broker may be and sometimes are represented by one person only, but in this case it is essential for the validity of the contract that such person should be the agent both for the buyer and seller lawfully authorized to sign a contract on behalf of both.

This second form of contract, No. 2 in the Appendix, is based on No. 1 and usually runs as follows:

The 'sold note' is addressed to the buyers. It runs—

'We have sold to you for our principals Messrs. *S & Co.* so much produce, to be paid for at such a price in cash on or before delivery if required, and to be delivered say ex quay on the 10th proximo, and the contract is subject to the Rules, Bye-Laws and Regulations of the Blank Association whether endorsed hereon or not. Brokerage $\frac{1}{2}$ per cent. or as the case may be, and the note is signed "*X, Broker.*"'

The bought note in a similar manner is addressed to the sellers and commences—

'We have this day bought from you for our principals Messrs. *B & Co.* so much produce, to be paid for at such a price in cash on or before delivery if required to be delivered say ex quay on the 10th proximo and the contract is subject to the Rules, Bye-Laws and Regulations of the Blank Association whether endorsed hereon or not. Brokerage $\frac{1}{2}$ per cent. or as the case may be, and the note is signed "*Y, Broker,*" or possibly, if the selling broker and the buying broker happen to be the same, "*X, Broker.*"'

Sometimes the form runs—

'*S & Co.* have this day sold and *B & Co.* have this day bought, and the note is signed "*X, Broker,*" and a signed copy sent to *A & B.*'

The practice among brokers as to the making and entry of contracts varies greatly. One broker will make three notes of the contract, the first of which will be entered in the broker's contract

book and be signed by him. It will contain a full note of the contract, the names of the buyer and seller, the price and all other conditions. He will also copy out the contract on a contract form and send one copy to the buyer and another copy to the seller or to the buying broker or selling broker as the case may be. He will send also to his principal, whether he is buyer, or seller, an advice note of the purchase or sale, and when these three duties are performed things cannot go far wrong in case of a lawsuit, provided all the documents agree.

Another broker will content himself with an unsigned entry in the contract book, and in such a case the 'memorandum in writing' necessary to satisfy the statute of 1893 must be found in the bought note or the sold note which is sent to the buyer or seller. If the buyer wishes to proceed he must produce a contract signed by the seller or his broker and vice versa.

Another will make no entry at all in the contract book, and unless the bought notes and the sold notes correspond there is sure to be trouble.

Another, say a buying broker, will send an advice note of the contract to his principal, e. g. 'I have this day bought for you,' and if he gets no sold note from the seller or selling broker the purchaser may find that in case of matters going wrong with the buying broker, he, the purchaser, cannot hold the seller to his contract.

A note commencing 'I have bought *for* you,' or 'I have sold *for* you' is a mere advice note as between principal and agent, and not a contract. It is a document on which the broker only may be liable, and the broker discharges that liability if he can produce a contract, and though the principal often does and usually may rely solely on his broker, and does not scrutinize too closely the form of his contract, it may be of great importance to him on some occasions to know that the contracts are properly made and that the bought note is in existence.

To sum up the position, the buyer may rest satisfied, as far as the form of the contract is concerned, if he or his broker holds a sold note signed by the seller or the selling broker, and the seller may be content if he or his broker hold a bought note signed by the buyer or the buying broker. The bought and sold notes must correspond.

It is an additional security both to buyer and seller if the broker, when acting for both parties, keeps a contract book and enters particulars of all contracts in this book and signs them. In such a case the contract in the broker's contract book is the primary contract, and the bought and sold notes which must correspond with the contract in the contract book are evidence of the contract.

The contract in the auctioneer's book is in effect a broker's contract, and in fact the auctioneer, who is the agent of the seller to sell and the agent of the man in the crowd to buy, is a good instance of a broker authorized to sign for both parties and binding them both by the entries in his book.

Such experience as I have had leads me to believe that in the press of business in modern times the broker's contract book is going out of fashion, and the true record of the contract of sale is to be found in the sold note and bought note.

It will no doubt be a sufficient compliance with the statute if the seller or his broker acknowledges the bought note sent him by the buying broker, or if the buyer or his broker acknowledges the sold note sent him by the selling broker, but it is more regular to have both bought note and sold note in existence and to ascertain that they correspond.

A third form of contract, form No. 3 in the Appendix, is used in cases where the selling and buying brokers guarantee their respective principals and charge a *del credere* or guarantee commission.

The only variation is that the form of sold note commences—

‘We acting on account of Messrs. *S* whose fulfilment of contract we guarantee have this day sold to you acting on account of Messrs. *B* whose fulfilment of contract you guarantee so much produce,’ &c., as before;

and the form of bought note commences—

‘We acting on account of Messrs. *B* whose fulfilment of contract we guarantee have this day bought from you acting on account of Messrs. *S* whose fulfilment of contract you guarantee so much produce,’ &c.

Here there is a contract between *S*, the sellers, and *B*, the purchasers, guaranteed by the selling and buying brokers respectively, who charge or should charge a *del credere* commission to their respective clients. This is the safest mode of contracting with firms who have foreign principals, and care must be taken to see that the foreign principals recognize the contract, and it would perhaps be an additional security that the selling and buying brokers should each get a distinct confirmation of the contracts so made from the principals for whom they act.

A fourth form of contract is very generally used, by which the rights of the buyer and seller, if not disclosed on the face of the contract, are excluded. The form, which is similar to form No. 1, contains the following clause:—

‘The contract of which this is a note is made between ourselves

and yourselves and not by or with any person, whether disclosed or not, on whose instructions or for whose benefit the same may have been entered into.'

Sometimes the clause runs as follows—

'The rights and liabilities of principals not disclosed on the face of this contract are excluded.'

But the principal must assent, and if he allows his agent to assume the character of a principal he must take the consequences.

The form containing words to this effect was devised to meet the decision in the well-known case of *Cooke v. Eshelby*, 12 App. Ca. 271, decided in 1887 to the following effect—

'Where an agent *X* sells in his own name for an undisclosed principal *S* and the principal *S* sues the buyer *B* for the price, the buyer *B* cannot set off a debt due from the agent *X* unless in making the contract he *B* was induced by the conduct of the principal *S* to believe, and did in fact believe, that the agent was selling on his own account.'

The four forms which I have just analyzed relate chiefly to the parties to the contract. There are also four forms in use, the terms of which relate mainly to the position of the goods sold. These are 'spot' contracts, 'arrival' contracts, 'f. o. b.' contracts, and 'c. i. f.' contracts.

A sale of goods for immediate delivery is known as a 'spot' sale. A sale of goods 'to arrive' is known as an arrival contract, and if the goods do not arrive at the port stipulated in the contract the contract is void. Sometimes the contract is so worded that if the vessel does not arrive the contract is void, and it has been held where goods were sold to arrive by a particular steamer with a memorandum in the contract to the effect that should the vessel be lost the contract was to be void, that there is a double condition and that the contract took effect only if the vessel arrived, and if on arrival the goods were on board. The forms of arrival contract are now much elaborated, and usually there are provisions in the contract expressly providing for the case of part of the goods being lost and part being transhipped and forwarded.

Another form of contract is the f. o. b., or free on board form, under which the seller puts the goods sold on board a vessel named by the buyer free of all charges to the buyer, and the goods are then at the buyer's risk subject to the seller's right to stop them in transit, provided the seller remains the holder of the shipping documents.

Another special form of contract is the c. i. f., or cost, freight, and insurance contract. Under this form of contract the buyer

pays the seller a lump sum which covers the cost of the goods and the cost of insuring the goods, and is credited by the seller with the amount of the freight which he will have to pay to the shipowner on the delivery of the goods. The seller takes out the policies and ships the goods, handing the buyer the bill of lading and the policy against payment either in cash or more usually by drafts.

Should the ship arrive with the goods on board the buyer will have to pay the freight, which will make up the amount he has engaged to pay. Should the goods not be delivered in consequence of a peril of the sea, he is not called on to pay the freight, and he will recover the amount of his interest in the goods under the policy.

In substance therefore the consignee pays, though in a different manner, the same price as if the goods had been bought and shipped to him in the ordinary way. See Lord Justice Blackburn's judgment in *Ireland v. Livingston*, L. R. 5 H. L. 406.

An ordinary form of the c. i. f. contract is as follows—

'We *S & Co.* have this day sold to you *B & Co.* so much produce at per lb. cost freight and insurance, to be shipped per the ss. *X* from say Galveston to Liverpool during the month of September. Marine insurance with first-class companies covering particular average and 5 per cent. in excess of invoice cost to be provided by seller. Payment by our drafts upon you at days' sight or payment shall be made in exchange for shipping documents or (at buyer's option) before the arrival of the vessel, or failing previous arrival not later than 75th day after date of bill of lading in cash.'

The bought note signed by or on behalf of *B & Co.* should be in similar form.

With these eight forms of mercantile contracts it will not be difficult to frame or to follow other forms. Year by year these forms are becoming more elaborate both in England and America, and the interpretation of them is becoming more and more difficult even for the skilled arbitrators who are frequently called upon to give decisions upon them; but on the whole the outlines of the contracts are simple, and if buyers and sellers bear in mind the principles laid down above some of those difficulties will be avoided which now frequently arise when these or similar contracts come before either arbitrators or judges of Mercantile Courts.

H. D. BATESON.

APPENDIX.

CONTRACT.

FORM NO. 1A.
PRINCIPALS ONLY.

FORM NO. 1B.
PRINCIPALS ONLY.

SOLD NOTE.
No.....
Liverpool,1895.

BOUGHT NOTE.
No.....
Liverpool,1895.

To Messrs.
We have this day sold to you :—
1. Quantity and description of Produce.....
2. Price and } Cash (or before delivery
terms of } if required) less 2½ per
payment } cent. discount.
3. Time and manner of delivery
4. Special Conditions :—This Contract is subject to the Arbitration
Clause and other Conditions of Sale of the Association,
whether endorsed hereon or not.
.....
.....
.....

To Messrs.
We have this day bought from you :—
1. Quantity and description of Produce.....
2. Price and } Cash (or before delivery
terms of } if required) less 2½ per
payment } cent. discount.
3. Time and manner of delivery
4. Special conditions :—This Contract is subject to the Arbitration
Clause and other Conditions of Sale of the Association,
whether endorsed hereon or not.
.....
.....
.....

CONTRACT.

FORM NO. 2A.

SELLING BROKERS ONLY.

FORM NO. 2B.

BUYING BROKERS ONLY.

SOLD NOTE.

No.....

Liverpool, 1895.

To Messrs.

We have this day sold to you for our principals Messrs.

1. Quantity and description of Produce

2. Price and { Cash (or before delivery
terms of { if required) less 2½ per
payment { cent. discount.

3. Time and manner of delivery

4. Special Conditions :—This Contract is subject to the Arbitration
Clause and other Conditions of Sale of the Association,
whether endorsed hereon or not.

Brokerage

BROKER.

BOUGHT NOTE.

No.....

Liverpool, 1895.

To Messrs.

We have this day bought from you for our principals Messrs.

1. Quantity and description of Produce

2. Price and { Cash (or before delivery
terms of { if required) less 2½ per
payment { cent. discount.

3. Time and manner of delivery

4. Special Conditions :—This Contract is subject to the Arbitration
Clause and other Conditions of Sale of the Association,
whether endorsed hereon or not.

Brokerage

BROKER.

CONTRACT.

FORM No. 3A.

SELLING BROKER: Principal guaranteed.

SOLD NOTE
No.

Liverpool, 1895.

TO MESSRS.

We, acting on account of whose
fulfilment of contract we guarantee, have this day sold to you,
acting on account of whose
fulfilment of contract you guarantee:—

1. Quantity and description of Produce
2. Price and $\left\{ \begin{array}{l} \text{Cash (or before delivery} \\ \text{terms of} \dots\dots\dots \end{array} \right\}$ if required) less $2\frac{1}{2}$ per
payment cent. discount.
3. Time and manner of delivery
4. Special Conditions:—This Contract is subject to the Arbitration
Clause and other Conditions of Sale of the Association,
whether endorsed hereon or not.

.....
Brokerage

.....
BROKER.

Liverpool, 1895.

MESSRS.

We hand you above copy of Contract Note for
Produce made by us on your account to-day, and your confirmation
will oblige.

Yours, &c.,

.....
BROKER.

FORM No. 3B.

BUYING BROKER: Principal guaranteed.

BOUGHT NOTE
No.

Liverpool, 1895.

TO MESSRS.

We, acting on account of whose
fulfilment of contract we guarantee, have this day bought from you,
acting on account of whose
fulfilment of contract you guarantee:—

1. Quantity and description of Produce
2. Price and $\left\{ \begin{array}{l} \text{Cash (or before delivery} \\ \text{terms of} \dots\dots\dots \end{array} \right\}$ if required) less $2\frac{1}{2}$ per
payment cent. discount.
3. Time and manner of delivery
4. Special Conditions:—This Contract is subject to the Arbitration
Clause and other Conditions of Sale of the Association,
whether endorsed hereon or not.

.....
Brokerage

.....
BROKER.

Liverpool, 1895.

MESSRS.

We hand you above copy of Contract Note for
Produce made by us on your account to-day, and your confirmation
will oblige.

Yours, &c.,

.....
BROKER.

CONTRACT.

FORM No. 4A.

SELLING BROKERS: Rights of Principals excluded.

SOLD NOTE.

No. 1895.
 Liverpool,

To MESSRS.

We have this day sold to you:—

1. Quantity and description of Produce.
2. Price and terms of payment { Cash (or before delivery if required) less 2½ per cent. discount.

3. Time and manner of delivery.
4. Special Conditions:—This Contract is subject to the Arbitration Clause and other Conditions of Sale of the Association, whether endorsed hereon or not.

The contract of which this is a note is made between the above-named parties and not by or with any other person, whether disclosed or not, on whose instructions or for whose benefit the same may have been entered into. The rights and liabilities of principals not disclosed on the face of this contract are excluded.

.....
 Liverpool, 1895.

MESSRS.

We have carried out your instructions by entering into the contract of which we enclose a note. You will observe that the contract is made between ourselves and Messrs. as principal parties, excluding any other rights or liabilities. Yours, &c.,

FORM No. 4B

BUYING BROKERS: Rights of Principals excluded.

BOUGHT NOTE.

No. 1895.
 Liverpool,

To MESSRS.

We have this day bought from you:—

1. Quantity and description of Produce.
2. Price and terms of payment { Cash (or before delivery if required) less 2½ per cent. discount.

3. Time and manner of delivery.
4. Special Conditions:—This Contract is subject to the Arbitration Clause and other Conditions of Sale of the Association, whether endorsed hereon or not.

The contract of which this is a note is made between the above-named parties and not by or with any other person, whether disclosed or not, on whose instructions or for whose benefit the same may have been entered into. The rights and liabilities of principals not disclosed on the face of this contract are excluded.

.....
 Liverpool, 1895.

MESSRS.

We have carried out your instructions by entering into the contract of which we enclose a note. You will observe that the contract is made between ourselves and Messrs. as principal parties, excluding any other rights or liabilities. Yours, &c.,

THE LIMITATION OF THE POWERS OF THE LEGISLATIVE COUNCIL IN INDIA.

THROUGHOUT all educated classes of the community in India, Native as well as European, a strong feeling has arisen against the constructive qualifications and limitations which have recently been imposed upon the powers of the Legislative Council in that country. In two notable instances not only has legislation been directed from home, but even precise instructions have been transmitted as to the form which this legislation should assume, if not as to the express words in which it was to be embodied. In the case of the Cotton Duties' Bill, effect has been given to these instructions by enunciating a supposed mandate, which left the Additional Members of Council no option in giving their votes. In the case of the Cantonment Act, a provision, which the public voice with one accord condemned, was happily withdrawn before those members were put to the invidious option of voting for what they disapproved or disobeying the mandate. It is proposed to examine in this paper, whether the qualifications and limitations imposed upon the powers of the Legislative Council can be supported upon constitutional grounds or arguments of policy and expediency. In order to do this it will be necessary first to set forth briefly the origin and constitution of this Council.

The British Parliament is a sovereign legislative body. No court or other authority can question its authority, once it has unmistakably expressed its will and intention in the form of an Act of Parliament. There is not in the British dominions throughout the world any other sovereign legislature. In the colonies and dependencies, those legislatures which exist are non-sovereign. They derive their powers from the British Parliament; and these powers are to be ascertained from the written document or documents, the statute or statutes, which conferred them, and usually defined and limited them. Whatever powers may have been conferred upon, or delegated to, these non-sovereign legislatures, the power of Parliament still remains supreme, and Parliament can still legislate in any manner it pleases for the colony or dependency in which a non-sovereign local legislature has been established.

India, having been acquired by conquest and cession rather than colonization, is usually styled a dependency; and the non-sovereign legislature now existing in this great dependency was constituted

by Act of Parliament, namely the Indian Councils' Act of 1861, since amended by other Acts. Under the constitution given to it by these statutes, the Legislative Council consists of (1) the Governor-General, as President with a casting vote; (2) the Commander-in-Chief, and the Lieutenant-Governor of the Province in which the Council is sitting; (3) the Members of the Governor-General's Executive Council (which forms a sort of Cabinet), usually five; and (4) a number, not less than ten or more than sixteen, of Additional Members, of whom not less than half must be non-officials, or persons not in the service of Government. It was only two years ago, in 1892, that the number of the Additional Members was increased from not less than six or more than twelve as fixed in 1861. In the debate in Parliament upon the amending Act which effected this change, the policy of inviting the non-official classes, Native as well as European, to assist in legislation was approved by all parties. The Act further enabled the Viceroy to make rules under which certain public bodies might select representative men for his appointment; and a further popular tone was given to the Legislative Council by permitting a discussion of the annual financial statement, and by allowing questions to be asked upon executive matters, though no division upon these subjects was permitted.

So much for the *personnel* of the Legislative Council; and now as to its powers. It is authorized to make laws and regulations for *all persons*, whether British or native, foreigners or others; and for *all Courts of Justice* whatever; and for *all places and things* whatever within the territories of India; and for *all servants* of the Government of India—subject, however, to certain restrictions and limitations, which are distinctly set forth. It cannot repeal or alter (1) a certain statute of 1833 (of which hereafter); (2) the statute of 1858, which transferred the Government of India from the Company to the Crown, and invested the Secretary of State for India with the powers of the Court of Directors and of the Commissioners for the affairs of India; (3) three other statutes which have no bearing on the subject with which we deal; (4) Acts of Parliament which enable the Secretary of State to raise money in England; (5) the Mutiny Act; (6) Acts passed by Parliament after the Councils' Act of 1861, and affecting India; (7) anything affecting the authority of Parliament, or unwritten law or custom affecting the allegiance of Her Majesty's subjects.

The Act of Parliament of 1833, which first conferred on the Governor-General in Council legislative powers for the whole of India, contained provisions somewhat similar to those which have just been set forth; and further enacted that nothing therein con-

tained shall extend to affect in any way the right of Parliament to make laws for the territories of India and for all the inhabitants thereof; and it was expressly declared that a full, complete, and constantly existing right and power was intended to be reserved to Parliament to control, supersede, or prevent all proceedings and acts whatsoever of the Governor-General in Council, and to repeal and alter at any time any laws or regulations whatever made by the said Governor-General in Council, and in all respects to legislate for the said territories and all the inhabitants thereof in as full and ample a manner as if that Act of 1833 had never been passed. Such are the essential provisions of the statute of 1833, which the Legislative Council constituted in 1861 may not touch, and by which its powers were expressly restricted. The other provisions as to powers and limitations contained in the statute of 1833 were repealed and, with such additions as the further experience of twenty-eight years had shown to be necessary, re-enacted in the Councils' Act of 1861. This Act contains two more provisions, which must be noticed. *First*: when a law has been passed by the Legislative Council, it has no force until the Governor-General has assented to it; and he can either assent or withhold his assent, or reserve the law for the signification of the pleasure of Her Majesty. *Second*: if the Governor-General assent, he must transmit a copy of the law to the Secretary of State for India, and Her Majesty may through him signify her disallowance, in which event the law is made void and annulled.

The constitutional checks upon rash or imprudent legislation by a majority of the members of the Legislative Council are then these three, viz. (1) the Governor-General withholding assent or reserving the measure for the signification of Her Majesty's pleasure; (2) disallowance by Her Majesty when the Governor-General had assented—in both these cases Her Most Gracious Majesty would of course be advised by Her Majesty's Government; (3) the power of Parliament (that is, of course, Queen, Lords and Commons) to repeal, alter, and enact whatever it pleased.

The scheme so far explained leaves one exigency not provided for. If the Governor-General refuse assent, or reserve, or Her Majesty disallow, there may be no law to govern a state of things which imperatively requires a law. This contingent emergency has not, however, been lost sight of; for the Governor-General is empowered by the Act of 1861, in cases of emergency, to make and promulgate *ordinances* for the peace and good government of the territories of India or any part of them; and such ordinances, unless previously disallowed by Her Majesty, have the force of law for six months. It is unnecessary to say anything here about the

power given to the Governor-General to overrule his Executive Council, our subject being concerned with legislation and not with executive government.

For twelve years after the establishment of the Legislative Council in 1861, it does not appear to have occurred to any one that the previous sanction of the Secretary of State for India was necessary before a proposed measure could be introduced into the Indian Legislature, though there were cases in which contemplated legislation was communicated to this member of the Home Government, and his opinion as to its policy solicited. In some cases, as for example the case of a proposed scheme of general codification, there can be no doubt as to the wisdom and expediency of this course. In 1874 this exceptional practice of seeking counsel and advice was converted into a general rule requiring the previous sanction of the Secretary of State before the introduction by the Indian Government of any measure into the Indian Legislature. In an important despatch of that year the then Secretary of State (the Marquis of Salisbury) adverted to the number and importance of the measures passed by the Governor-General in Legislative Council, and brought for the first time to his official knowledge when transmitted to him under the provision already noticed after receiving the Governor-General's assent. 'I see no sufficient reason,' wrote the Secretary of State, 'why the circumstance, often quite accidental, that your Excellency's orders take a legislative form should deprive me of all official information concerning them until a period at which it becomes peculiarly difficult to deal with them.' The despatch then dwelt upon the inconvenience that might arise from disallowing a whole enactment merely because it contained one objectionable provision, all its other provisions being excellent or unobjectionable; and finally laid down the following general rule for future observance:—

'Whenever the Governor-General in (Executive) Council has affirmed the policy and expediency of a particular measure, and has decided on submitting it to the Council for making laws and regulations, I desire that a despatch may be addressed to me, stating at length the reasons which are thought to justify the step intended to be taken, and the mode in which the intention is to be carried out.' It is then directed that this despatch be accompanied, or immediately followed, by a copy of the bill; and that the date at which it is intended to submit the bill to the Legislative Council be so fixed as to afford the Secretary of State sufficient time to address to the Governor-General such observations as he may deem proper. From this general rule were excepted measures of slight importance and measures urgently requiring speedy enactment;

but in the following year (1875) it was further directed that the Governor-General, when about to deal with any measure under this exception, should without delay telegraph his intention to the Secretary of State.

How this rule of previous approval was converted into the principle of previous sanction, and how this principle of previous sanction was further deemed to warrant the initiation of measures by the Secretary of State, the dictation of the form which these and other measures should assume, and even a direction to the Governor-General that measures so initiated and formulated be passed by the Legislative Council, will appear from the following extract from a speech of the Under-Secretary of State for India (the Hon. Edward Stanhope) in the House of Commons in June, 1879: 'The Governor-General had no option but to pass them' (i.e. the enactments recommended by the Law Commission), 'and the statute, by virtue of which measures were so sent to India to be passed, was still unrepealed. So again, Sir Charles Wood directed the Government of India to pass the bill for the abolition of the Grand Juries of the Presidency Towns, and they had to do it. Of course such a power ought¹ to be recklessly exercised; but that it should exist was only in accordance with common sense. It was not conceivable that the Governor-General should have the power of passing Acts of his own free will in opposition, it might be, to the feeling of Parliament and of the Government of this country, and subject to no controlling influence except that of his recall.'

Now, the Governor-General of India never had power to pass any Act of his own free will. He is and always has been subject to the controlling influence of his Council, Executive and Legislative; and the honourable gentleman wholly overlooked the three very efficient checks upon inexpedient legislation provided by the Act of Parliament, as above explained. That there was no one to point this out—no one to tell the Under-Secretary of State for India that the reason of the non-repeal of the statute of which he spoke was, that no such statute ever existed, is gravely suggestive of the danger to which the interests of a vast empire are exposed when dealt with by a distant Legislature in which that empire has no representation.

On the same occasion Sir William Harcourt² said that it was important to observe 'that there was one principle admitted by,

¹ *Sic* in Hansard, but probably the monosyllable 'not' was omitted in the speech or the report of it.

² It was a motion by him for the production of certain despatches that had passed between the Secretary of State and the Governor-General.

he believed, every Secretary of State, and assented to by Lord Salisbury in 1876, and it was that, as a general and almost unvarying rule, the initiation in Indian measures, and particularly measures of finance, should belong to the Indian Council and the Governor-General in Council; that they should not be dictated from the outside, but that they should come from those who were most likely to be informed about the interests of India. This was necessary for two purposes—to maintain the authority of the Government of India in India, and to maintain the confidence of the people in that Government. In 1874 Lord Salisbury modified the rule by requiring the Government of India to communicate its measures to the Government at home before they were passed¹ and completed; and to that he made no objection, as far as it went; but in 1875 measures were taken which, rightly or wrongly, in the opinions of both the Legislative and Executive Councils, assumed the form of dictation as to the course they were to pursue and the measures they were to pass.' Can the action of the Secretary of State in respect of the Cotton Duties, and the mandate to the members of the Legislative Council, be reconciled with the principles here laid down?

But whence is the doctrine of 'previous sanction' by the Secretary of State derived? There is no express authority for it in any of the Acts in which is contained the written constitution of the Legislative Council. Implied authority is equally wanting, and argument from construction is against it. That the idea of previous sanction was familiar to the minds of those who drafted these Acts is clear. The Act of 1861 expressly requires the previous sanction of Her Majesty, signified by the Secretary of State, for the constitution of a local legislature in any subordinate presidency, division, province, or territory. The same Act requires the previous sanction of the Governor-General for the introduction into the Legislative Council of any measure affecting the public debt, the religious rights and usages of the people, and other matters. The same previous sanction is required for the introduction of various measures into the Local Legislatures; and the Act passed two years ago supplies a further instance of express enactment requiring previous sanction. Can it be contended that the intention so carefully expressed in these cases existed, but was left to be implied, in the most important case of all?

But it may be said that the power reserved to Her Majesty of signifying through the Secretary of State her disallowance of Acts assented to by the Governor-General, involves the power of for-

¹ It will be observed that this should be 'before they were submitted to the Indian legislature.'

bidding the introduction of a measure which, if introduced, passed and assented to, may be disallowed. As reasonably might the Home Secretary intimate to one of Her Majesty's judges that a prisoner accused of some crime need not be tried, because if tried and convicted he would be pardoned. Something of this kind was attempted, when a pardon under the great seal was pleaded on eventful occasions in our own history, and we know how our ancestors dealt with the matter.

In 1875 Lord Salisbury disapproved of the passing of a Tariff Act at Simla, because the Governor-General was thus deprived of the advantages to be derived from the presence of the non-official members in Calcutta. 'In providing,' said he, 'that laws for India should be passed at a Council consisting not only of the Ordinary Members of the Executive Government, but of Additional Members specially added for the purpose (of whom some have always been un-official), it was the clear intention of Parliament that in the task of legislation the Government should, in addition to the sources of information usually open to it, be enlightened by the advice and knowledge of persons possessing other than official experience. Of these you were unfortunately deprived in discussing subjects in respect to which the assistance of mercantile councillors is of especial value. The rapidity of your procedure prevented you from receiving, from external sources and in an informal shape, the counsels which, in consequence of the time and place of legislation, could not be tendered in debate.' It is reasonable to say that the advice tendered to Her Majesty by the Secretary of State to disallow or not disallow a measure passed in India, ought to depend upon a consideration of all the opinions and arguments of those invited to discuss it upon the assumption of their competence to do so based upon special knowledge and experience; and it could never have been intended to give to the Secretary of State, any more than the Governor-General, the power of deciding without hearing where the interests of two hundred millions of Her Majesty's subjects are concerned.

As regards the principle of protection, for example, are those acquainted with the commercial wants of India to be precluded from expressing their views of what is expedient for that country? Great Britain has here adopted a faith of her own, and believing it necessary to salvation she would impose it on others. But the whole world have not accepted this faith. Some of the nations decline to be converted to it. Some of her own children in Australia have accepted and adhere to contrary views. And even in England there are thinking men, whose opinions are not the less valuable because they are free from the bias of self-interest, who

doubt the wisdom of a rule that has no exceptions, and are unable to assent to the soundness of a policy which has gone far to destroy our home agricultural industry, and might in a few days inflict starvation upon the million inhabitants of London, if our navy lost command of the sea. Even assuming that protective duties are bad, there may be other forms of taxation much worse under the particular circumstances; and why should India be denied the option of evils, which is permitted to Australia?

It has been supposed that an argument in support of the doctrines of previous sanction and legislative vote by mandate may be derived from the relations which, in the time of the Company, existed between the Governor-General and his Council on the one part, and the Court of Directors and the Board of Commissioners on the other part. By the Regulating Act of 1773 (13 Geo. III. c. 63, s. 9), it is enacted that the Governor-General and Council shall, and they are hereby directed and required to, pay due obedience to all such orders as they shall receive from the Court of Directors. There was then no formal legislative body in India; but a subsequent section of the same statute empowered the Governor-General and Council to make and issue rules, ordinances, and regulations for the good order and civil government of the country, and to impose reasonable fines and forfeitures for the breach of them. Possibly the Court of Directors might then have ordered the Governor-General and Council to make and issue any particular rule, ordinance, or regulation; and the order would have been obeyed, although it may be doubtful if the provision as to *due obedience* in the earlier section, which is apparently concerned with executive matters, governs the later section, which is concerned with rules, ordinances, and regulations. It may be observed that the term 'laws' is not here used; and it was not till 1833, when the Governor-General in Council was empowered to legislate for the whole of India, that the laws and regulations so made were declared to have the force and effect of Acts of Parliament (3 & 4 Will. IV. c. 85, s. 45).

In 1833, by the statute last mentioned, the Board of Commissioners for the affairs of India was constituted and given full power and authority to superintend, direct, and control all acts, operations, and concerns of the Company. In 1858, when the Government of India was transferred to the Crown, the Secretary of State for India was vested with all the powers of the East India Company or Court of Directors or Court of Proprietors, which could then be exercised by the direction or with the sanction or approbation of the Board of Commissioners.

The argument then stands thus:—Parliament is supreme, sovereign.

Parliament in 1773 enacted due obedience, and this enactment remains unrepealed to this hour. The obedience which in 1773 was to be rendered to the Court of Directors is now to be given to the Secretary of State for India, and that obedience is exigible equally in matters executive and legislative. To this argument it is submitted that it is a sufficient answer to say that the provision as to due obedience in the statute of 1783 cannot be made applicable to the legislative status created in 1833, or to that created in 1861, neither of which could possibly have been within the intention of that statute: that the language and construction of the statute of 1861 (it is unnecessary to consider further that of 1833) show that it was then intended by Parliament to confer full legislative functions (except where otherwise expressly provided) upon the Legislature then constituted for India: and as these full powers were conferred upon this Legislature and its members by the same supreme Parliament, which enacted the rule of due obedience in 1773, nothing duly done in the exercise of these powers can be a violation of a rule which has not been expressly made applicable, and upon reasonable principles of construction is not impliedly applicable to legislative functions. No doubt the Secretary of State may, under the rule of due obedience, forbid or direct the Governor-General in Executive Council to introduce any measure into the Legislative Council; but he cannot direct the Legislative Council to pass a measure so introduced; and even where the introduction of a measure has been forbidden to the Governor-General, any Additional Member may move to introduce it, unless it come within the exceptions requiring special previous sanction.

That it was intended to give full legislative powers to the Council created in 1861, appears not only from the language of the statute itself, but from the whole debate. Sir Charles Wood, who introduced the bill, expressly said that it altered the means and manner of legislation for India; and that in the then state of public feeling in that country it was quite impossible to revert to the state of things in which the Executive Government did the work of legislation. The pages of Hansard show that in both Houses the idea of making the Council a consultative or deliberative body was rejected; and that, in accordance with the recommendation of Lord Canning, it was to have full and independent legislative functions. It has been assumed that the Secretary of State, governing himself by a resolution of the House of Commons, may require the Legislative Council in India to legislate according to such resolution, and that it is incumbent upon the members of the Council to comply with this mandate. If this be a sound constitutional doctrine, a curious result will

follow. Parliament, that is, Queen, Lords and Commons, in 1861 empowered the Legislative Council of India to make laws for all persons, all courts, all places, all things in India, with certain express exceptions; but the House of Commons alone, in respect of any matter, if without the exceptions, can forbid, and if within the exceptions, can direct, legislation. In other words, one House can set aside an Act passed by Parliament. No doubt Parliament can, if it please, pass any measure for India. But this would enable the House of Commons alone to do so. Is this constitutional?

The power of Parliament is, as has been already stated, supreme, sovereign—in theory at least, for its exercise will always be governed by policy. In 1765 Parliament asserted its power to tax the American Colonies even without representation, and passed an Act declaring that power. Just twelve years after, in 1777–8, ‘taxation by the Parliament of Great Britain for the purpose of raising a revenue’ having ‘been found to occasion great uneasiness and disorders,’ it was ‘enacted that after this Act’ (i. e. of 1777–8) ‘the King and Parliament of Great Britain will not impose any duty, tax or assessment whatever, except only such duties as it may be expedient to impose for the regulation of commerce.’ Taught by the experience of the past, Parliament, at least, we think, while the House of Lords forms part of the constitution, will assuredly never again tax a colony or dependency and raise the question of taxation without representation; but if the doctrine of legislation for India by resolution and mandate is sound and constitutional, any House of Commons by resolution, and any Secretary of State by despatch, may direct the passing of a Taxation Act, and stir up a grave political question. The action recently taken and the doctrines recently enunciated have created dissatisfaction and uneasiness, which have for the time been allayed by the wisdom of Mr. Fowler, the present Secretary of State for India; and by the noble policy of the House of Commons upon Sir Henry James’s motion: but if there can be any doubt as to the powers and independence of the Indian Legislature, it were well that this doubt be removed before its existence create fresh complications, the consequences of which may not be removable by the mere provisions of a Declaratory Act.

C. D. FIELD.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

Traité théorique et pratique de droit international privé. Par ANDRÉ WEISS. Vols. I and II. Paris: L. Larose. 1894. 8vo.

MR. WEISS, who is a Professor of the Paris Law Faculty, is already known as the author of an excellent elementary book on Private International Law in one volume. The present is a much more exhaustive treatise.

The first of the present volumes is devoted to Nationality, and the second to what the author calls 'le droit de l'étranger.'

The volume on Nationality contains a detailed examination of the law of France, with a synopsis of the laws of other countries and a short historical introduction. The commentary is in the orthodox style of French law-books, that is, giving the author's construction and views rather than those laid down in judicial decisions. This is of course due to the fact that precedents have no binding authority in the French Courts. The test of a good French law-book, in fact, is the closeness of the author's own judicial reasoning. In this respect the book bears careful scrutiny, though on some points we fancy we notice weakness. Thus in the discussion of the new enactments we observe the following passage:

'Les lois de 1851 et de 1874 n'avaient pas réalisé les espérances de leurs promoteurs. La faculté d'option réservée aux individus que ces textes déclaraient Français au jour et par le fait de leur naissance, était pour eux un moyen commode de se dérober aux charges auxquelles tous les Français sont astreints; et ils ne faisaient pas faute d'en user, conservant ainsi dans notre pays, dont ils avaient pris les habitudes et les mœurs, dont ils parlaient la langue, une nationalité étrangère et une situation privilégiée.' (Vol. I. p. 197.)

Has not Mr. Weiss here departed from his habitual accuracy of reasoning? To be excluded from all public functions, from all government of a country, though bearing equally with citizens all taxation, does not seem a privileged position. We should rather say the opposite. The author alludes of course to the 'military service' which is obligatory upon Frenchmen. But he omits to mention that military service is the correlative obligation of a great variety of privileges possessed by Frenchmen in their own country. Foreigners are excluded, as we have said, from all public employment, even from teaching in the public schools, from the public factories, from tenders for state contracts, and, in fact, from everything which it is possible to reserve for Frenchmen. This is only proper, but it misleads the unwary to talk of the privileged position of foreigners in France, and we are surprised at such an observation from so large-minded a writer as Mr. Weiss.

Mr. Weiss is also not quite accurate in his account of English law. Thus the sense of the third paragraph of Section 7 of the Act of 1870, upon which he bases an argument, is quite misunderstood in the following translation:

'L'étranger qui aura obtenu la naturalisation jouira des mêmes droits, politiques ou autres, que le citoyen d'origine, pourvu toutefois qu'il soit

considéré comme sujet britannique dans sa patrie d'origine, s'il vient à y séjourner.' (Vol. I. p. 28.)

In spite of a few such inaccuracies of fact and reasoning, however, the book deserves consideration, if only for its size and the evident pains at which the author has been to embrace in it everything which could be serviceable for the practitioner.

In the second volume the author follows the same distribution of his subject as in the first. Among the subjects dealt with are property generally and copyright, patents, trade marks, trade names in particular. The public status of foreigners and foreign companies also forms part of this volume. A useful appendix contains the chief international treaties relating to the position of foreigners in France and of Frenchmen abroad. Other volumes are to follow.

T. B.

A Treatise on the Doctrine of Res Judicata, including the Doctrines of Jurisdiction, Bar by Suit, and Lis Pendens. By HUKM CHAND.
London: William Clowes & Sons, Lim. 1894. Large 8vo.
xx, 61 and 764 pp.

THIS is a remarkable book. It is published in London; it was printed in Bombay; it was written at Delhi; and it is dedicated to Lord Herschell. The author is a Master of Arts, but we are not told of what University. Presumably he is a lawyer, but whether he is a judge or an advocate we are also not informed.

It is a stupendous book. It contains 764 pages with 38 closely printed pages of Addenda. The author claims that he has referred in the text to four thousand cases, and to all the American and English text-books on the subject. He also makes copious references to French authors and to writers on the Civil Law. As far as can be gathered from a cursory inspection Mr. Hukm Chand seems to have really done all that he claims to have done. He tells us that he has had 'to rely entirely on the unaided resources of his own private library.' It is almost impossible, therefore, that all his quotations are made directly from the authors whom he quotes, but still his authorities seem, all of them, to have been carefully selected and judiciously compared.

Mr. Hukm Chand writes excellent English. He rarely makes a slip; and his language is clear. He must also have a good knowledge of Latin and French.

As to the actual merits of Mr. Hukm Chand's book it would be difficult, without a very lengthy examination, to offer an opinion. But the book impresses one favourably: his quotations are apt; his arrangement is good; and his own remarks are sensible. Still one cannot help asking, of what use is such a book likely to be? Mr. Hukm Chand hopes that his book will not fail to be useful in any country, and that it will be specially useful to Indian lawyers. I am inclined to think that the first of these hopes is more likely to be realized than the second. Probably any experienced lawyer, with good libraries at hand, might use the book with advantage. On any critical point he would, of course, follow up the abundant references given, and test the authorities for himself. But the vast majority of Indian lawyers have no libraries to refer to; and (it is no disparagement to them to say) a discussion in which French and Latin quotations, English, Indian, and American authorities are mixed up together would only bewilder them. They had better take the language of the Civil Procedure Code as their guide, and trust to the light of nature to interpret it rightly.

W. M.

Des contrats par correspondance. Par JULES VALÉRY. Paris: Thorin et Fils. 1895. 8vo. 461 pp. (8fr. 50.)

M. JULES VALÉRY has produced a learned and elaborate monograph, including much more consideration of foreign laws and literature than has been usual in French books. His theory of contracts by correspondence is like that of the latest English authorities, but goes a step farther, for he holds the contract to be concluded by any overt act of acceptance. Also he applies the same rule to the revocation of offers, and avoids inconvenient consequences by maintaining an independent right of the addressee to damages for untimely revocation. It appears that the French Court of Cassation has taken refuge from some of the difficulties by treating the question at what place a contract was concluded as a question of pure fact. M. Valéry justly points out that this is unsatisfactory.

As M. Valéry has taken the trouble to use English books, and use them in the main very well, we do not understand why he seems not to care whether he quotes a recent or an obsolete edition. Surely it is understood in France as well as in England that citing an old edition of a law-book, except for the strictly historical purpose of showing what doctrines were approved or current at a certain date, is neither just to the author nor safe for the reader.

F. P.

A Collection of Statutes relating to Criminal Law. Reprinted from the Fifth Edition (by J. M. LELY) of Chitty's *Statutes of Practical Utility*. With an Introduction and Index. By W. F. CRAIES. London: Sweet & Maxwell, Lim., and Stevens & Sons, Lim. 1894. La. 8vo. xxxvi and 429 pp.

MR. CRAIES, in his preface to this collection of Criminal Statutes, expresses the hope that it 'will be found useful as a supplement to Archbold and Roscoe.' The teaching of some practical experience is that as a supplement to Stephen's Digest it enables the possessor of both to do without Archbold and Roscoe altogether. Each of those excellent works contains, in one place and another, the bulk of the criminal statutes, and when Mr. Craies's book is used as a supplement to either of them, the possessor has under his hand, if he knows where to look for it, most of Mr. Craies's information twice over. The Digest, however, is really as well as ostensibly a digest and not a dictionary, and does not profess to set out sections of statutes, but only to give their effect in the most condensed form. This, therefore, and the Criminal Statutes seem to be the true complements, or supplements, of each other. In our opinion, since the appearance of the Digest, no equally useful book on criminal law has been published, and with the exception of one serious error, to be mentioned presently, and one or two omissions, which, though to be regretted from the practitioner's point of view, were the natural consequence of the scheme of Chitty's collection, we have nothing for it but the warmest praise. Whatever text-book may be used, reference to the statutes themselves is frequently indispensable, and they could not be presented in a more convenient or portable form than this. The index appears, after continuous use for several weeks, to be thoroughly good. The volume includes the Prevention of Cruelty to Children Act, 1894, and 'the relevant portion of' the Merchant Shipping Act, 1894, both of which were passed too late for insertion in the current edition of Chitty. It does not contain the Corrupt Practices Acts, or any part of them, these being

classified in Chitty under the heading 'Parliament.' The notes appear as in Chitty, and are therefore the work of Mr. Lely and his predecessors, Mr. Craies supplying the index and one introduction, the tables of cases and of statutes, and about three pages of corrections of text and notes, entitled 'Addenda to Notes.' Some of these last are rather important, and their incorporation will improve future editions. The introduction contains a succinct and accurate account of the recent development of the law.

The error to which we have referred concerns the effect of the Penal Servitude Act, 1891. It occurs in a note and pervades the text, and Mr. Lely is therefore primarily responsible for it, but we rather wonder that it has passed Mr. Craies's scrutiny. Sect. 4 of the Larceny Act, and a considerable number of other sections, are made to provide a maximum penalty of three years' penal servitude for 'simple larceny' and other offences. In a note to the section so stated (p. 221 (s)) Mr. Lely says: 'This "three" was altered to "five" by the Penal Servitude Act, 1864 . . . but the "five" was altered back to "three" by s. 1 of the Penal Servitude Act, 1891.' The facts are these. By the Consolidation Acts the punishment for simple larceny, unlawful wounding, and some other offences of importance was enacted to be three years' penal servitude or imprisonment. The Penal Servitude Act, 1864 (27 & 28 Vict. c. 47, s. 2), enacted that 'no person shall be sentenced to penal servitude in respect to any offence committed after the passing of this Act for a period of less than five years, and where under any Act now in force a period of less than five years is the utmost sentence of penal servitude that can be awarded, a period of five years shall, in respect of any offence committed after the passing of this Act, *in such Act be substituted for the less period.*' This section is repealed by the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69, s. 1, suba. (3)). According to Mr. Lely and Mr. Craies the effect of this repeal was to revive the minimum sentences of three years enacted previously to 1864. The editors of Stephen's Digest (5th ed., p. 1, n. 1) differ from them, and so does the editor of Archbold (21st ed., p. 198), and so does the practice of the judges, so that we should have expected a less confident statement. In our judgment it may properly be argued that the result of the words '*in such Act*,' italicized in the above extract from the Act of 1864, is to amend all the previous Acts, for if not what do the italicized words mean? And if the previous Acts were amended it seems that the amendments would survive the repeal of the amending Act, on the principle on which repeals survive the repeal of the repealing Act. But it is unnecessary to rely on so circuitous an argument. As the editor of Archbold points out, the first section of the Penal Servitude Act, 1891, itself, in the first sub-section, enacts 'where, under any enactment in force when this section comes into operation, a court has power to award a sentence of penal servitude, the sentence may, at the discretion of the court, be for any period not less than three years, *and not exceeding either five years or any greater period authorized by the enactment.*' The intention by this sub-section to abolish certain *minimum* sentences was notorious, and the passage here italicized may have been overlooked, but the contention that this Act can 'alter back' the lowest *maximum* of penal servitude from five years to three is surely not tenable.

Saving this error, which might conceivably lead to serious misunderstanding, the book is admirable. It has already been found exceedingly useful, and few of the persons constantly engaged in the administration of the criminal law will be able to afford to do without it.

Judicial Statistics: Part I—Criminal Statistics. Edited by C. E. TROUP. Prefixed by a Report of a Departmental Committee. The Stationery Office. 1895. 4to. 250 pp. (3s. 8d.)

It has long been admitted by all persons familiar with the subject that the statistics of crime annually published by the Home Office were in want of a complete revision, which they have now more or less received at the hands of a Departmental Committee. The duty of the editor acting under general instructions from the Committee has been twofold: he has in the first place to decide what information he is to give, and in the second how to give it. Taking the less difficult task first, we have no hesitation in saying that the form of the new statistics reflects credit on every one concerned. The tables containing the necessary figures are printed clearly and with the smallest possible variation between their respective appearances, which greatly facilitates comparison between them. The nature of each table is suitably indicated at the top of the page, they are all arranged (there are fifty-eight of them altogether) on a simple and intelligible plan, and there is a capital index. Individually most of these matters are trifles, but collectively they make all the difference between one who is not an expert being able or not to use such works as the present. How far the subjects of the statistics have been wisely chosen, or rather how far the principles on which the choice has been made are sound, is a more difficult question. It must be remembered that the Committee have had their hands tied to some extent by the existence of previous statistics with which it will in future be desirable to make comparisons; the breach between the old and the new series must not be too abrupt, and this accounts in some degree for the inclusion of as many as nineteen indictable offences out of a total of eighty-two in a class of miscellaneous offences, and the contents of some of the tables. The tables omitted relate chiefly to prisons and certain expenses, which no doubt are more aptly inserted in a different publication. The new comparative tables, that is, tables giving a synoptical view of similar figures during the last ten years, leave nothing to be complained of, though we should like to see a comparative table of the proportion of acquittals to convictions. We have a table containing the numbers of indictable offences committed, and another showing the number of trials for each offence, and thanks to judicious printing the two are easily compared; but we do not find any list of the number of non-indictable offences committed, but only one of the number of apprehensions made in respect of them. The difficulties of tabulating figures as to previous convictions are very great, and are fully noticed in the Introduction. We are glad to see in the Report that the construction of a comparative table on the subject is contemplated, and we hope it may be found possible to construct a table showing what previous offences persons convicted of various crimes have been convicted of. Meanwhile we do not see much value in Table XXXV, and place very little reliance on Table XXVI giving the number of suspected persons at large. Mr. Troup, in our judgment, shows a wise discretion in taking indictable offences committed as a test of criminality, and we quite concur in the reasons he gives for this step. It is also plain that he is aware of the pitfalls in his way provided by the Summary Jurisdiction Acts and other alterations of the law. We could wish that the authors of the Report had shown an even greater reluctance than they have to enter into a consideration of the 'personal condition' of offenders. It is easy to ascertain their sex and their approximate age, but the degree of their education, their domicile, and their occupation are a good deal more difficult to judge of, especially when

we consider how the judging must necessarily be done. We hope, at least, that these subjects will form the ultimate boundary of the scope of official inquiry, and that the recommendation of a distinguished outsider to inquire into their diseases and 'signs of degeneration' will be resolutely avoided. The diagrams now provided for the first time are useful for persons who do not care to look at figures, but we fear that the maps showing the distribution of crime among the counties are subject to too many qualifications to make them of much real value.

Prideaux's Precedents in Conveyancing, with Dissertations on its law and practice. Sixteenth Edition. By JOHN WHITCOMBE and BETHUNE HORSBRUGH. London: Stevens & Sons, Lim. 1895. Vol. I, 1 and 872 pp. Vol. II, xlvii and 895 pp. (£3 10s.)

THE great popularity of this book is proved by the short time (two years) that has elapsed since the publication of the last edition. This popularity arises in part from the manner in which the precedents are arranged. A clerk who has but small legal knowledge can frame a draft correctly, if indeed the draft is to follow closely any of the precedents contained in this book, with only a moderate amount of supervision from his principal. The present edition is brought out by Mr. Whitcombe in conjunction with Mr. Bethune Horsbrugh. The provisions of the Trustee Act, 1893, the Copyhold Act, 1894, the Voluntary Conveyances Act, 1893, the Married Women's Property Act, 1893, have, so far as they affect the Law and Practice of Conveyancing, been incorporated in this edition.

The very useful account of the death duties which appeared in the last edition has been brought up to date, and the provisions of the Finance Act, 1894, so far as they relate to the death duties, are set out in an intelligible form. It would not be possible without a very laborious and minute examination of this book to detect all the new matter in it. We may however point out that the precedent at Vol. II, p. 455, 'Conveyance of land as a site for a building to be used for parish purposes in connexion with the Church of England,' is new. We think that it will be found very useful, not only because the provisions contained in it are likely to work smoothly, but also because a person who uses it will avoid falling into errors commonly committed by ignorant draftsmen who undertake to prepare trust deeds for parish rooms. (See as to this the case and opinion printed in the *Guardian* Newspaper of Feb. 7, 1894, p. 231.)

The Merchant Shipping Act, 1894. By ROBERT TEMPERLEY. London: Stevens & Sons. 1895. La. 8vo. lxxx and 719 pp. (25s.)

THIS is the fourth book on the Merchant Shipping Act, 1894, that has come to us for review—the fourth, the last, and the most complete. Mr. Temperley has given himself more time to work on the Act than his competitors, and the result is a full, complete, and most satisfactory work. To begin with, the table of cases is of respectable length, and contains some 600 cases. Over 100 statutes are noticed as not being dealt with by the Consolidation Act. A full table showing the corresponding sections of the existing and repealed Acts follows. The Introduction calls attention to certain undoubted changes in the law effected by the new Act; and the reader is prudently warned that 'it is impossible either for the draughtsman or the editor in every case (of changes in wording of the new Act) to foresee

their full effect.' No doubt we shall soon hear more of the alterations in the law effected by the so-called Consolidation Act of 1894. Only the other day an important and difficult question arose upon s. 547 with reference to the costs of a salvage action in consequence of the new wording of the existing statute.

The notes mainly deal with cases illustrating the effect of the various sections of the Act. In some cases they are of considerable length; for example, s. 34, dealing with the rights and liabilities of a ship mortgagee, itself only a few lines in length, is followed by two pages of closely printed notes. So, also, the notes on the 'compulsory pilotage' sections are of considerable length, and set out as concisely as possible the effect of the numerous cases upon that thorny subject. Perhaps some of these are too concise. For an instance of this we may refer to the notes on *The Guy Mannering and General Steam Navigation Company v. British and Colonial Steam Navigation Co.*, which are scarcely consistent as statements of the law with regard to the shipowner's liability for damage done by his ship when in charge of a pilot. The distinctions in such cases are so extremely fine that it is almost impossible to state the effect of the decisions in general language. Cases of the current year are noted (see p. 314); and some cases not to be found in any text-book are cited (cf. *Burrell v. Macraigne*, p. 331). One slip only we note: *The Hankow* is not to be found on p. 576.

On the whole, Mr. Temperley's book is the nearest approach to the sort of work on the Merchant Shipping Act which on a former occasion we mentioned as never having hitherto been supplied. We think it will take a leading position in the literature on the subject. It is a goodly volume; but the Admiralty foul anchor embossed upon the cover does not quite faithfully reproduce the well-known emblem in Probate, Divorce, and Admiralty Court, II.

4 Concise Treatise on the Law of Wills. By H. S. THEOBALD. Fourth Edition. London: Stevens & Sons, Lim. 1895. La. 8vo. cxxxv and 787 pp. (30s.)

THE steady growth of the table of cases and of the text in each successive edition of this well-known work shows that there is no diminution in the flow of reported cases on Wills. Of some eighty additional pages of text in this edition about thirty are occupied by a new chapter on tenant for life and remainderman. This new edition will fully maintain the reputation of the book as a concise and convenient work of reference, supplying at once a condensed and trustworthy digest of the law of Wills, and a finger-post to every authority which need be consulted. An examination of the text in search of a considerable number of recent cases has disclosed no single omission. Exception may be taken to the statement in the Preface that the rule against perpetuities applies to legal remainders, since the decision to which the author presumably refers (*Frost v. Frost*, 43 Ch. Div. 246) may rest firmly on another and independent rule recognized in *Whitby v. Mitchell* (44 Ch. Div. 85). But this is not the place to enter further into that difficult question, of which we shall hear a great deal more before the rule against perpetuities can safely claim any such extension as is here suggested.

A Manual of Public International Law. By THOMAS ALFRED WALKER. Cambridge: At the University Press. 1895. 8vo. xxviii and 244 pp. (9s.)

A COUPLE of years ago Dr. Walker published an interesting and suggestive, though perhaps somewhat hastily composed treatise upon 'The Science of International Law'.¹ He has now compressed his materials, evidently after careful revision, into a manual, or 'Grundriss,' primarily intended for the use of students. The work is divided into four Parts, devoted respectively to an Introduction, to the law of 'normal relations,' as the author chooses to describe the law of Nations in time of peace, and to what he considers to be the 'abnormal relations' of War and Neutrality. Through all these 'Parts' there runs a continuous series of numbered propositions in black type, which, if printed by themselves, would form something like a code of International Law; but each of them is explained at some length, and illustrated by brief references to diplomatic discussions and judicial decisions. Every help is provided for rapidly finding one's way about the book, by means of marginal notes, indices, and an analytical table of contents. The execution of the work, considering how wide a field had to be surveyed, leaves little to be desired. The language employed is not always free from ambiguity, e.g. the definition of International Law as 'the code of states and communities to which has been accorded recognition of belligerency,' p. 3; and here and there one meets with statements which are not quite satisfactory, e.g. with reference to 'intervention,' p. 25; to 'spheres of influence,' p. 30; to 'notification,' p. 32; to 'ratification,' p. 84. But the work as a whole possesses great merits. Its arrangement marks the considerable progress which has been made in realizing the relations one to another of the different topics of the science since, say, the publication of Wheaton's 'Elements,' in 1836. It is not disfigured by any allusion to so-called 'Private International Law'; and it is enriched throughout by references which testify to the author's wide acquaintance, not only with the relevant older literature, but also with recent Parliamentary papers, American as well as English, as also with the tendencies of contemporary opinion, as traceable in the transactions of the Institute of International Law, and in the foreign Reviews specifically devoted to the subject of which he has so successfully indicated the salient features.

Private International Law. By Sir WILLIAM HENRY RATTIGAN. London: Stevens & Sons, Lim. 1895. 8vo. xv and 267 pp. (10s. 6d.)

IN British India, which is said to border on the territories of nearly seven hundred independent native States, the importance of Private International Law is doubtless undeniable; and, although we may not agree in thinking that even for Englishmen 'such treatises as those of Westlake and Foote are hardly adapted for a College course,' it is quite possible that no work has hitherto appeared which exactly suits the requirements of Indian students of the subject. Such at any rate is the opinion of Sir William Rattigan; and the present work is intended to supply what is wanted. It is in many respects likely to answer its purpose. Its seven chapters deal respectively with the growth and general theory of the science: nationality and domicile; status and family law; the law of things; the law of obligations; 'immaterial rights,' procedure and foreign judgments. The treatment of the several subdivisions of the subject testifies to the wide

¹ See LAW QUARTERLY REVIEW, vol. ix. p. 383.

reading and good sense of the writer, though one may doubt whether the chapter on copyright, patents, and trademarks would not have been better omitted, and one feels throughout that the question of jurisdiction is insufficiently distinguished from that of the choice of law. The language employed occasionally leaves something to be desired, as where we read that 'no such comity exists and never will exist'; and one meets with such phrases as 'burghal-community'; 'action,' instead of 'act'; 'placeat,' instead of 'placat.' There is a reference to the repealed statute 4 Geo. IV. c. 91, but no mention of the Foreign Marriage Act, 1892. The least satisfactory portion of the book is to be found in its opening paragraphs, which might lead one to suppose that the function of Private International Law is to regulate 'the jural relations between citizens and foreigners.' Sir William Rattigan knows better; for he had just quoted von Bar's definition of the science as that which 'determines the applicability of the legal systems and the jurisdiction of the agencies of different States in private legal relations.' The historical sketch which follows is clear and able; and, as might be expected, the book contains, here and there, interesting information upon the legislation of British India, e.g. as to the proceedings which may be taken under the Code of Civil Procedure by and against native princes and their envoys. There is also a full account of the important recent decision of the Privy Council in the case of *Sirdar Gurdial Singh v. The Rajah of Faridkote* (94, A. C. 670).

The Law and Practice of Rating. By EDWARD JAMES CASTLE, Q.C.
Third Edition. London: Stevens & Sons, Lim. 1895. 8vo. xlvii
and 655 pp. (25s.)

MR. CASTLE has not displayed such care in preparing his third edition as the excellence of his earlier work leads one to expect of him. In conciseness and lucidity the book leaves little to be desired, but it is by no means free from mistakes. At page 43, section 430 of the Merchant Shipping Act, 1854, is set out at length, though it was repealed nine months before the publication of this work and re-enacted in somewhat different language in the Act of 1894. And even the repealed section is not quoted correctly, a superfluous 'not' having crept in, whereby the effect of the enactment is grievously misrepresented. On the same page the Lunatic Asylums Act, 1853, is quoted, and no reference is made to the Lunacy Act, 1890, by which the earlier Act was repealed and quite different provisions were substituted. On page 88 the result of *West Ham v. London County Council* is incorrectly stated. The true ground of distinction is between underground and over-ground sewers, not between those that do and those that do not 'occupy public property.'

Mr. Castle has added some useful chapters on procedure, but these are not quite up to date. Thus though he quotes s. 6 (1) of the Local Government Act, 1894, no pains have been taken to show in detail what duties of overseers are thereby transferred to Parish Councils. For instance, at page 536 it is said that the overseers may, with the consent of the vestry, appeal against the valuation list. This is no longer the case in rural parishes. The Parish Council appeals, and the consent of the vestry is no longer required. *Clark v. Fisherton Anger* is treated as an authority that the costs of an appeal from sessions are in the discretion of the Court, and no reference is made to *London County Council v. West Ham* in the Court of Appeal ([1892] 2 Q. B. 173), which appears to overrule that case, and

establishes that when the order of sessions is quashed the High Court has no jurisdiction to allow costs. *Rex v. Shropshire* is quoted as deciding that 'fourteen clear days' notice means fourteen days including both the day of the notice and the day on which the sessions meet. In fact it decides exactly the contrary, viz. that the fourteen days must be reckoned exclusively of those days.

We would suggest to Mr. Castle that it would be convenient to quote cases by their names instead of by fancy titles, such as 'the London Sewers cases,' 'the Kensington Stores case,' and to use the recognized citations of the Law Reports, rather than the clumsier ones adopted by him, such as 'L. R. 17 Q. B. D.,' 'L. R. (1891) 2 Q. B.,' 'L. R. (1894) App. Cas.' The addition of 'L. R.' to citations of later date than the Judicature Acts is worse than superfluous; it might easily give rise to confusion.

The Principles of Rating. By EDWARD BOYLE and G. HUMPHREYS-DAVIES. Second Edition. London: William Clowes & Sons, Lim. 1895. La. 8vo. xxiv and 1163 pp. (25s.)

To a lawyer who had not an edition of the Statutes or Fisher's Digest this book would be of great use. The appendix contains most of the statutes that relate to rating, together with some that do not, and two sections of a repealed Act, viz. ss. 389 and 430 of the Merchant Shipping Act, 1854. The corresponding sections of the Merchant Shipping Act, 1894, are not given. There is also a digest of cases for which the authors acknowledge their indebtedness to Fisher. The headnotes of cases taken from the Law Reports appear to be faithfully copied, even when they fail to give the whole effect of the decision. Thus in the case of *West Ham v. London County Council* ([1893] A. C. 562), the headnote does not draw attention to the distinction made between underground and overground sewers. Messrs. Boyle and Humphreys-Davies accordingly fail to notice the distinction in their digest though they discuss it in the text (p. 71). Even there, however, though they quote Lord Herschell's reasons at length, they fail to appreciate the generality of the distinction, and seem to find difficulty in reconciling it with the well-established principle that there can be no prescription for an exemption from rateability. Lord Herschell's ground for upholding the exemption of underground sewers is that he considered it inexpedient for the House of Lords to disturb the law as interpreted by a long course of decisions. There was no suggestion of a prescriptive exemption, nor need it be supposed that 'the Court [*sic*] thought that it was necessary to make special exception of the particular property, as under the peculiar circumstances least injustice would be done.'

The book might be improved by severe compression. The style is very diffuse, and the practice of setting out judgments at length instead of giving the effect of the decision on the law has been indulged in without stint.

There is too a good deal of repetition and a want of orderly method. Who, for instance, would look in the chapter on 'Procedure in the Metropolis' for the changes introduced in rural parishes by the Local Government Act, 1894? In writing the chapter on 'Procedure outside the Metropolitan Area' the authors seem to have forgotten this Act, and do not mention that in rural parishes appeals against the valuation list are now brought by Parish Councils instead of by overseers, and the vestry can no longer order owners to be rated instead of occupiers under 32 & 33 Vict. c. 41, s. 4.

The Law of Copyright in Designs, together with the Practice relating to Proceedings in the Courts and in the Patent Office. By LEWIS EDMUNDS; assisted by T. M. STEVENS and MARCUS V. SLADE. London: Sweet & Maxwell, Lim. 1895. 8vo. xviii and 291 pp.

SINCE the great development of legislation and commerce in property in designs no separate work has dealt with this matter. This omission the authors endeavour to supply, and with considerable success. The work is well written and well printed, and contains all that is necessary for the legal or trading communities. The important questions connected with novelty and publication obtain adequate treatment, while careful consideration is given to the difficult problem, 'What is a design?' On this point, however, we should have expected some reference to the discussion in the House of Lords on the kindred question, 'What is the design of a picture?' to be found in *Hanfstaengl v. Baines*, '95, A. C. 20, decided in December, 1894. However, the book is a good and honest one.

The Law of Compensation. By EYRE LLOYD. Sixth Edition, by W. J. BROOKS. London: Stevens & Haynes. 1895. 8vo. xlv and 496 pp.

MR. BROOKS, who assisted Mr. Lloyd in the preparation of the fifth edition in 1882, appears to be solely responsible for this edition. The editor has re-written some chapters, and has succeeded in incorporating the many cases decided since 1882, without increasing the size of the book. Indeed the number of pages is fifty-seven less than that of the fifth edition. On this the editor is to be heartily congratulated. A common way of preparing a new edition is to leave untouched the old matter and merely sandwich in the new as best may be, with the result that many originally good books become unreadable after the first few editions. Among the wholly new matters we find the editor has dealt with compensation under the Housing of the Working Classes Act, 1890, but we fail to understand why he has not given a chapter to the important and somewhat novel provisions for compensation for land taken under the Allotments Act, 1887, and the Local Government Act, 1894. It seems probable that there will be a large number of arbitrations under these enactments, and some guidance as to their interpretation by the light of cases decided on earlier Acts would have been invaluable. We wonder what the lay arbitrator will make of the provision in s. 9 (11) of the Act of 1894, that except in the prescribed cases he shall not hear 'counsel or expert witnesses.' The phrase 'expert witness' is, we believe, new to statute law, though it has been used pretty generally by the judges since 1854, when it made its first appearance in the reports in the case of *Eads v. Williams* (4 De G. M. & G. 674). There is however still room for discussion as to the precise meaning to be attached to the term.

It may be that the editor would plead as his excuse for omitting these Acts that many of the provisions of the Lands Clauses Acts are incorporated subject to adaptations to be prescribed by the Local Government Board, and that the Board has not yet prescribed any adaptations. If this be his reason, the difficulty illustrates the inconvenience of the modern method of legislating in general terms, leaving the details to be filled in, and from time to time varied, by a Government Department.

Generally speaking, the editor seems to have done his work thoroughly

well, and to have produced an excellent edition of a book whose merits are too well known to require further comment.

Contempt of Court, Committal and Attachment and Arrest upon Civil Process in the Supreme Court of Judicature, with the Practice and Forms. By JAMES FRANCIS OSWALD, Q.C. Second Edition. London: William Clowes & Sons, Lim. 1895. 8vo. xxxvi and 295 pp. (12s. 6d.)

MR. OSWALD's book upon Contempt of Court, which met with so favourable a reception on its first appearance some three years ago, has already run into a second edition. Its popularity was assured from the first, for the work was practically the only accessible one on the subject, and was written by one who was well versed in its theoretical and practical aspects. Little can be usefully added to the remarks already made upon this book, which unites considerable learning and research with a light and pleasant style. The present volume, while in the main preserving the same features as the last, has been partly rearranged with regard to its chapters, while the various suggestions and proposed measures for the amendment of the law as to contempt, including the abortive Bill of 1894, are fully dealt with. The interest taken in the case of the *Duchess of Sutherland* (*Times*, March 19, 1893) is no doubt responsible for the instructive and entertaining chapter on the manner in which persons committed for contempt are dealt with in prison. The fuller detail in which the author has dealt with some of the heads of his subject, e.g. that of privilege from arrest, and the addition of many new cases which are brought down to date, has unavoidably increased the size of the work, in which moreover the excellent practice of giving references not only to the Law Reports but to all other Reports has been carried out.

A Handbook of the Law of Defamation and Verbal Injury. By F. T. COOPER. Edinburgh: W. Green & Sons. 1894. 8vo. lxxvi and 319 pp. (14s. net.)

SEVENTY years have elapsed since the publication of the only previous Scots book exclusively devoted to the law of defamation. The material differences between the Scots and English law on the subject have, at the same time, made a free use of the modern English treatises somewhat hazardous. In England, for instance, the presumption that words are defamatory arises much more easily in cases of libel than in cases of slander; in Scotland, language is either defamatory or not, and its being spoken or written makes no difference in determining whether it is defamatory. Again, in England, it is essential to the plaintiff's case that the defamatory words should be communicated to a third person. Scots law, on the other hand, grants *solatium* for injured feelings, and, consequently, publication to the person defamed alone is sufficient to ground an action. Practitioners, mindful of these and other distinctions between the two systems, are wary of relying too much on the guidance of English authorities, and, while wearily searching the digests, have very often longed for a modern Scots treatise on this department of jurisprudence.

In this work Mr. Cooper has provided a ready means of getting at the Scots decisions relating to any particular question that can arise in connexion with this branch of the law. To this end the book is ingeniously

arranged. There is an exhaustive dictionary, admirably put together, of words and imputations complained of as defamatory in reported cases, with the name of the case in which they occurred. The dictionary occupies forty pages; for a Scotsman's vocabulary of abuse is not straitened or colourless, it is vigorous and picturesque. The defender who employs epithets or expressions to which nothing analogous can be found in this dictionary must have a notable command of original language; and this is rare. The arrangement of the text, too, is simple and logical, though exception may well be taken to the plan of treating the plea of *veritas* as a branch of the doctrine of privilege. Justification and privilege are certainly quite distinct in England. The classification of defamatory imputations under appropriate heads cannot fail to greatly facilitate reference. The whole work, indeed, is, in many respects, rather a skilfully-arranged digest than a treatise. Not infrequently, the author, in place of grappling with a difficulty, takes refuge in a generalization, and in some places, where a careful balancing of arguments would have been appropriate, we find merely a confident assertion. It is perhaps unfair, however, to expect in a 'hand-book' a full presentation of so complex a subject.

Throughout the book Mr. Cooper exhibits considerable independence of view, criticizing dicta and even decisions with an easy freedom. Occasionally his boldness strikes us as indiscreet, as when (p. 2) he characterizes a doctrine, 'often laid down in decisions,' as a 'worthless legal fiction, which has been, not very successfully, bolstered up . . .' Again, the rule that imputations holding a person up to public ridicule and contempt are actionable—supported though it be by a 'volume of decisions'—is, in Mr. Cooper's judgment, 'a rule which permits the law to be the handmaid of passion and sentiment, and to be a judge of aesthetics in criticism.' Clearly a 'handmaid of passion' will not make a good judge, even though she be merely judging 'aesthetics in criticism'—whatever that is. If, however, by aesthetics are meant the canons of good taste, Mr. Cooper is not guiltless of their breach; he is not an 'aesthete in criticism.'

We have also received:—

The Law of Negligence in New York. By JOHN B. LEAVITT. New York: Diossy Law Book Co. 1895. La. 8vo. lv and 806 pp.—Mr. Leavitt's work is a digest of the most full and elaborate kind, furnished with every possible appliance in the way of indexing and cross reference. It will probably be indispensable to practitioners in the State of New York, of great use to American text-writers, and of appreciable use to practitioners in other States. As it deals exclusively with New York decisions, we cannot say that it is likely to be used here except for occasional verification of particular lines of authority on points where our own reported cases are meagre. Some of the learned author's incidental remarks on the manner in which cases are got up and argued lead us to think that the average of both general education and professional training in the Bar of the Empire State must leave a good deal to be desired. Other passages illustrate the mischief (by no means confined to the State of New York) wrought by the late Mr. D. D. Field's premature and over-ambitious attempt to codify the common law.

The French Civil Code, with the various amendments thereto as in force on March 15, 1895. By HENRY CACHARD. London: Stevens & Sons, Lim.: 1895. 8vo. xii and 611 pp. (20s.)—This translation of the Civil Code is

admirably done and supplies a distinct want to the English lawyers. The expressions of French law in many of the articles are almost incapable of being succinctly translated into English, but Mr. Cachard has been very successful in giving their meaning, so far as it is possible to reproduce it in an English form and English legal phraseology. We wish the book the success which it certainly deserves.

A Dictionary of Crimes and Offences according to the Law of Scotland. By JOHN W. ANGUS. Revised by R. B. SHEARER. Edinburgh: W. Green & Sons. 1895. 8vo. 538 pp.—This book, we doubt not, will be serviceable to magistrates and others engaged in administering the Criminal Law in Scotland. The various crimes and offences of a criminal nature are grouped, dictionary-wise, under separate heads. To many of the definitions notes in smaller type are appended, containing illustrations and references to standard authorities. The statements of the law are concise and, so far as we can discover, accurate. A magistrate, who has this work near his desk, will be able, after a few rapid glances at its pages, to exhibit a really creditable acquaintance with Scots Criminal Law. If, however, he happen to be dealing with a contravention of the Factories and Workshops Acts, or of the Coal Mines Regulation Act, 1887, or of certain other statutory enactments, he will look for information in vain; and he may possibly be somewhat annoyed.

Marine Insurance. By WILLIAM GOW. London: Macmillan & Co. 1895. 12mo. xviii and 401 pp.—This is one of the series of 'Commercial Class-Books' now in course of publication by Messrs. Macmillan. The book is not written by a lawyer, and is presumably not intended for the use of lawyers. The Preface modestly claims that the work is 'adapted for the needs of beginners, and of those desirous of obtaining a general knowledge of the principles and practice of marine insurance, rather than a complete criticism of recent decisions on the subject.' Those 'recent decisions' seem to be brought up to date, but many of the forms of citation used are unusual, and in some instances references to the Times Law Reports only are given—e.g. *Reischer v. Borwick* (p. 142) is reported '94, 2 Q. B. 548, and *The Bedouin* (p. 205) will also be found in the Law Reports, '94, P. 1.

The Law Journal Quarterly Digest, Jan. 1 to March 30, 1895. London: Stevens & Sons, Lim. (2s. 6d.)—Lord Campbell wanted to have a decennial auto-da-fé of all reported cases. Failing this heroic remedy we have to fall back on digests, and it is evident that the digest is becoming more and more indispensable to the practitioner every day. The present digest is an instance of this necessity. It does what not the most industrious of practitioners can do for himself or only at an utterly disproportionate expense of time and trouble. Here we have a complete and compendious summary of current case law for the past quarter, enabling the practitioner to discover at a glance whether in all the multifarious literature of reported cases from the Times Law Reports or the Law Times note to the finished product of the reporter in the pages of the Law Reports, there is anything which concerns him. We said complete, and so the digest is with one qualification. Why no references to 'The Reports'? *Fas est et ab hoste doceri.*

Adoption and Amendment of Constitutions in Europe and America. By CHARLES BORGEAUD. Translated by C. D. HAZEN. With an Introduction by JOHN M. VINCENT. New York and London: Macmillan & Co. 1895. 8vo. xxi and 353 pp. (8s. 6d. net.)

The Conveyancing Acts, 1881, 1882 and 1892 . . . and the Settled Land Acts, 1882 to 1890, with Notes. By E. P. WOLSTENHOLME, W. BRINTON and B. L. CHERRY. Seventh Edition. London: William Clowes & Sons, Lim. 1895. 8vo. xxxii and 499 pp. (20s.)

The Law and Practice in Enfranchisements and Commutations . . . together with the Copyhold Act, 1894, fully annotated. By ARCHIBALD BROWN. Second Edition. London: Butterworths. 1895. 8vo. xxi and 503 pp. (16s.)

Le système judiciaire de la Grande Bretagne. Par le C^{te} DE FRANQUEVILLE. Two volumes. Paris: J. Rothschild [London: Stevens & Sons, Lim.] 1893. 8vo. Vol. I, viii and 614 pp. Vol. II, x and 740 pp. (24s. net.)

The Relationship of Landlord and Tenant. By EDGAR FOA. Second Edition. London: Stevens & Haynes: Waterlow & Sons, Lim. 1895. La. 8vo. cxv and 765 pp.

History of the Law of Real Property in New York. By R. L. FOWLER. New York: Baker, Voorhis & Co. 1895. 8vo. xxxvi and 229 pp. (\$3 net.)

The Patents, Designs and Trade Marks Acts, 1883 to 1888. Consolidated with an Index, by LEWIS EDMUNDS. Second Edition. London: Stevens & Sons, Lim. 1895. La. 8vo. 86 pp. (2s. 6d.)

The Life of Sir James Fitzjames Stephen. By his brother, LESLIE STEPHEN. With two portraits. London: Smith, Elder & Co. 1895. 8vo. x and 504 pp. (16s.)

The Law of Property. By REGINALD A. NELSON. Madras: Srinivasa, Varadachari & Co.; London: Sweet & Maxwell, Lim. 1895. 8vo. xiii, 494 and xxxi pp.

A Digest of the Law relating to District Councils. By G. F. CHAMBERS. Ninth Edition. London: Stevens & Sons, Lim. 1895. La. 8vo. xxvi and 283 pp. (10s.)

The Principles of Bankruptcy. By RICHARD RINGWOOD. Sixth Edition. London: Stevens & Haynes. 1895. 8vo. xxxii and 381 pp.

The Revised Reports. Edited by Sir FREDERICK POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. Vol. XIX. 1817-1818 (6 Dow; 2 & 3 Swanst; 1 B. & Ald.; 8 Taunt.; 1 & 2 Moore; 5 Price; 2 Stark). London: Sweet & Maxwell, Lim.; Boston, Mass.: Little, Brown & Co. 1895. La. 8vo. xvii and 758 pp. (25s.)

A Digest of the Law of Easements. By L. C. INNES. Fifth Edition. London: Stevens & Sons, Lim. 1895. 8vo. xxviii and 127 pp. (7s. 6d.)

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.

THE LAW QUARTERLY REVIEW.

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NOTES.

THE Institute of International Law met at Cambridge last August as guests of Trinity College and Trinity Hall. Professor Westlake, Q.C., was elected President, and Director Perels, of the German Admiralty, author of the well-known work on International Maritime Law, and M. Clunet, the Paris advocate and editor of the *Journal du droit international privé*, vice-presidents. The following members were present:—Professor von Bar, Professor Harburger, Professor Stoerk, and Director Perels (Germany); M. Clunet, M. Darras, Professor Lehr, Professor Lyon-Caen, and Councillor de Montluc (France); Professor Buzzati, Professor Catellani, and Professor Sacerdoti (Italy); Professor de Martens and M. Kapoustine, an ex-professor of law and now Director of Education at Petersburg (Russia); Professor Beirão, ex-Minister of Justice (Portugal); Professor Lammasch (Austria); General den Beer-Portugael (Holland); Professor Matzen, President of the Danish Senate (Denmark); M. Rolin-Jacquemyns, ex-Belgian Minister of the Interior and now European adviser to the King of Siam, and M. Ed. Rolin, Editor of the *Revue de droit international* (Belgium); M. Kebedgy (Greece); Professor Roguin (Switzerland); and Professor Westlake, Professor Holland, Professor Leech, Professor Goudy, Lord Reay, Sir D. Mackenzie Wallace, Sir Sherston Baker, Mr. E. J. Lawrence, and Mr. Thomas Barclay (Great Britain).

The chief questions dealt with were the revision of the Berne Copyright Convention, diplomatic rights and immunities, and the penal sanctions applicable in respect of the Geneva Convention for the protection of the wounded in time of war.

As regards the first, the resolutions (which by the way will be considered at the coming official meeting of the Copyright Union) may be summed up as follows:

1. The duration of the right of translation should be extended from ten to twenty years. At the same time, the opinion was expressed that it should be assimilated to the duration of the copyright of the original work. 2. The duration of the copyright

of reproductions abroad should be the ordinary time fixed for copyright in the country of reproduction—that is to say, that the foreigner should have the same protection as native subjects, and not, as at present, have the duration shortened if the law of the country of origin granted a shorter period of protection. 3. As regards the question of formalities, the convention states that, when effected in accordance with the law of the country of original publication, protection in the other States of the Union is ensured by such formalities without anything more being done. As the English Courts have delivered divergent decisions as to the sense of this provision, the Institute has redrawn it, so that no further doubt as to its meaning is possible. 4. In a similar way a more precise wording to secure authors against adaptations would render the article in the convention on this subject unequivocal. The existing convention, moreover, grants power to the contracting States to make reserves contrary to the main provision of the article—a manifest compromise which the Institute proposes to strike out. 5. Newspaper articles are dealt with in the convention without proper discrimination. The Institute proposes to protect all but political articles and news, subject always to the obligation of the reproducer to indicate the source. 6. The convention should contain a provision for the protection of photographs of protected works, but otherwise the provisions as to photographs should be retained.

The discussion on diplomatic immunities showed some divergency between the English and the continental view, the latter tending to a restriction of the principle of extritoriality which the English members seem less prepared to advocate.

The Geneva Convention question resulted in the drawing up of a proposed supplementary convention, under which, if adopted, each High Contracting Party would undertake to promulgate a penal law to ensure the convention being carried out. Any breaches under it would be communicated as between the belligerents through a neutral State, and would necessarily entail an inquiry on the part of the belligerent against whom the charge is brought.

Interesting decisions were arrived at in committee as regards nationality and contraband of war, but these subjects will be dealt with in the full sittings at the next meeting, which is to take place in September, 1896, at Venice.

Honorary degrees were conferred on Professor von Bar of Göttingen and Professor de Martens of Petersburg, and the Institute had every reason to be gratified by the hospitable reception extended to them by the University, its colleges, and private residents.

T. B.

The judgment of the Privy Council in *Le Mesurier v. Le Mesurier*, '95, A. C. 517, is to all persons interested in the development of private international law a decision of first-rate importance.

First. It reaffirms in the broadest manner the principle contained in such cases as *Wilson v. Wilson*, L. R. 2 P. & D. 435, 442, that divorce jurisdiction depends upon domicile.

Secondly. It negatives the theory countenanced by *Niboyet v. Niboyet*, 4 P. Div. 1, that residence falling short of domicile, described sometimes by the misleading term matrimonial domicile, is sufficient to give jurisdiction in matters of divorce.

Thirdly. It deprives *Niboyet v. Niboyet* of all authority, for the judgment delivered by Lord Watson is much more than a refusal to follow *Niboyet v. Niboyet*; it is an exposure of the error fallen into by the two eminent judges by whom that case was in opposition to the judgment of the present Master of the Rolls decided. They thought that wherever any other matrimonial suit could before the Divorce Act have been entertained by an Ecclesiastical Court, the Court of Divorce had divorce jurisdiction under the Act of 1857. But 'there appears,' says Lord Watson, 'to be an obvious fallacy in that reasoning. It is not doubtful that there may be residence without domicile sufficient to sustain a suit for restitution of conjugal rights, for separation, or for aliment; but it does not follow that such residence must also give jurisdiction to dissolve the marriage. Their lordships cannot construe sect. 27 of the Act of 1857 as giving the English Court divorce jurisdiction in all cases where any other matrimonial suit would previously have been entertained in the Bishop's Court' (p. 531).

We may feel sure that neither in the Court of Appeal nor in any other Court will the effect of *Niboyet v. Niboyet* be extended, and we feel some confidence that if by any strange chance a precisely similar case should ever be brought before the House of Lords, their lordships will follow *Le Mesurier v. Le Mesurier* rather than *Niboyet v. Niboyet*. The rules as to divorce jurisdiction are the product of judicial legislation, and we congratulate the Privy Council on having by a judge-made law placed the matter of divorce jurisdiction on a clear and sound basis. The defects of judicial legislation are patent and have often been exaggerated. It has the one great merit that, unlike Parliamentary legislation, it constantly tends towards the establishment of broad and equitable principles.

Men of common sense who are unacquainted with law are apt to suppose, very gratuitously, that fine legal distinctions are always due to the over-subtlety of lawyers. They quite as often arise from what may be called the subtlety of the nature of things. Has

a party to a contract who has agreed to hire goods on condition that he may terminate the contract at any time by returning them to the owner, but that upon the payment by him of certain instalments the goods shall become his property, 'agreed to buy the goods'? This is a question which in *Helby v. Matthews*, '95, A.C. 471, 11 R. Aug. p. 1, has perplexed three courts. In the County Court it was held that the hirer did not agree to buy the goods. In the Court of Appeal it was held that he did agree to buy them, and the House of Lords has finally agreed with the judge of the County Court. Nor can any one on reflection doubt that the House of Lords is right. The test for determining whether the person who hired the goods was a mere hirer and also a purchaser is clear. If the hirer was at any time legally compellable to buy the goods, he agreed to buy the goods. If on the other hand he was at no time under a legal obligation to buy them, he was a hirer, but not a purchaser. Now it is certain that at no part of the transaction upon which the decision in *Helby v. Matthews* depends, was the hirer bound to take the goods—in other words, he never agreed to buy them.

In *Flood v. Jackson*, '95, 2 Q. B. 21, the Court of Appeal has maintained and perhaps extended its decision in *Temperton v. Russell*, '93, 1 Q. B. 715, holding that if *A*, on the advice of *P*, does something to *Z*'s disadvantage which he, *A*, has a perfect right to do, *Z* may have a remedy against *P* if *P* acted 'maliciously' in the opinion of a jury, though there is no proof that anything was done at any stage which was unlawful either as between *A* and *P* or as between *P* and *Z*. We have the gravest doubts whether this decision can be correct, and whether it is not really an attempt to restore the old doctrine of conspiracy exploded by the House of Lords in the *Mogul Steamship Co.'s* case. But, as we understand this case is going to the House of Lords, we say no more at present by way of criticism. The following note by a very learned contributor works out the results of the cases as they stand.

How far can one person, *X*, without exposing himself to an action, induce another person, *M*, to break a contract, or not to enter into a contract, with a third party, *A*?

With regard to this admittedly difficult inquiry, the line of cases beginning in 1853 with *Lumley v. Gye*, 2 E. & B. 216, and ending in the present year with *Flood v. Jackson*, '95, 2 Q. B. (C. A.) 21, 14 R. June, 147, suggests the following general conclusions, which however can be maintained only on the assumption—which is

possibly erroneous—that *Temperton v. Russell*, '93, 1 Q. B. (C. A.) 715, and *Flood v. Jackson* are well decided.

1. *X*, if he acts without any malicious motive and without any desire to benefit himself at *A*'s expense, may advise *M* to break a contract which *M* has made with *A*, and, if his advice is followed, does not expose himself to an action by *A* (*Bowen v. Hall*, 6 Q. B. Div. 333, especially p. 338). Thus if *M* is engaged to marry *A*, and *X*, with a view to *M*'s happiness, advises and induces her to break off the engagement with *A*, *X* incurs no liability to *A* (see *Lumley v. Gye*, 2 E. & B. 216, 247). And *semble* the case would be the same even if *X*, whilst still acting solely with a view to *M*'s benefit, offered her some pecuniary advantage for breaking her contract with *A*; and *a fortiori* *X* is not liable to an action if, without any malice or view to his own interest, he dissuades *M* from entering into any contract, e.g. a contract of marriage, with *A*. (American decisions fully support this distinction.)

2. *X*, for the promotion of his own trade or for the sake of avoiding competition in his trade, may deal with *M* on terms which are intended to induce him, and which do induce him, not to enter into contracts with *A* and others, and *X* does not thereby incur any liability to an action. Thus *X* has a right to sell *M* goods at a lower rate on condition that *M* shall not purchase goods of the same kind from *A* and others; and so *X* has a full right to offer his goods or services at a rate below the price which is remunerative, and thereby put an end to the competition of *A* and others, and in neither case does *X* expose himself to an action. Competition, in short, in matters of trade is perfectly lawful, and does not become actionable because it injures a man's rivals (*The Mogul Case*, '92, A. C. 25). It may indeed be laid down that the general rule of law is that as long as a man simply exercises the rights which the law gives him he does not expose himself to an action on the part of persons damaged by the exercise of his rights; and this in general, though not invariably, holds good even though he exercise his rights, e.g. as a landowner, with a view to the injury of others (compare *Corporation of Bradford v. Pickles*, '95, 1 Ch. 145, 64 L. J. Ch. 101, C. A., and *Chasemore v. Richards*, 7 H. L. C. 349, 388).

3. *X* renders himself liable to an action by *A* if by means which are in themselves unlawful, e.g. by assaulting *M*, or by threatening *M* with violence, he induces *M* to break a contract with *A*, or not to enter into a contract with *A*.

4. *X* renders himself liable to an action by *A* if for the purpose of injuring *A* (i.e. maliciously), or of benefiting himself at *A*'s expense, he induces *M* to break a contract with *A*, as where *X* by

the offer of higher wages induces *M* to break a contract of service with *A* and enter into the service of *X* (*Bowen v. Hall*, 6 Q. B. Div. 333; *Lumley v. Gye*).

5. *X* renders himself liable to an action by *A* if for the purpose of injuring *A* (i. e. maliciously) he induces *M* not to enter into a contract with *A*, and this is so even though the inducement to *M* not to contract with *A* is the threat by *X* to do some act which in itself *X* has a right to do, causing inconvenience or damage to *M*. This is apparently, at any rate, the principle established by *Temperton v. Russell* and *Flood v. Jackson*. These cases, it is submitted, go to this length: that if *X*, with a view to compel *M* not to employ *A* or to deal with *A*, refuses himself to deal with *M* unless *M* ceases to deal with or employ *A*, and thereby does induce *M* not to deal with or employ *A*, *X* does a malicious act for which he is liable to an action by *A*. As regards the class of cases to which *Temperton v. Russell* and *Flood v. Jackson* belong, it appears to be established that 'what would otherwise be a legal act may be made illegal by the addition of an intention to injure another person, who is in fact injured' thereby (*Flood v. Jackson*, '95, 2 Q. B. (C. A.) p. 41, judgment of Rigby L.J.).

[It is clear that this may be so in some kinds of cases, such as malicious prosecution and the abuse of privileged occasions. The question is whether the class of cases in hand is really analogous to these.—ED.]

6. In any case in which, under the above principles, *X* is not liable to an action by *A*, it would seem that *X*, *Y*, and *Z*, if they join in inducing *M* to break or not to enter into a contract with *A*, are not liable to proceedings for conspiracy, and conversely, where *X* does under the above principles expose himself to an action by *A*, it would seem that *X*, *Y*, and *Z*, if they join in inducing *M* to break or not to enter into a contract with *A*, are liable to proceedings for conspiracy.

The same contributor continues:—

These general conclusions suggest two observations.

First. The Courts, in determining how far *X* has a right to interfere with what may in very general terms be described as freedom of contract on the part of his neighbours, attach an exceptional importance to *X*'s motives. The general rule of law is that an act otherwise in itself lawful does not become unlawful, because it is done from a bad or malicious motive. If *X* has a right to build a wall blocking out the light from *A*'s windows, he may, whatever be his motive, build it without fear of an action. Whether he erect the wall for his own convenience or to spite *A*, he does

what he has a legal right to do, and does not invade the rights of *A*. So, again, if there is no right of way over *X*'s land, he may, if he chooses, for the mere purpose of spiting and injuring *A*, refuse to let him use a short path over *X*'s land; and even though *X* permit every one but *A* to use the path, he does not expose himself to any legal penalty. When, however, *X* attempts to interfere with his neighbour's freedom of contract, or, in other words, to prevent *M* from dealing with *A*, which is merely the same thing as depriving *A* of the advantage of dealing with *M*, *X*'s motive, as we have seen, becomes all-important. He may certainly advise and may induce *M* not to enter into a contract with *A*, if *X*'s motive be simply to benefit *M* or to push his own business by the ordinary arts of competition. If, on the other hand, *X*, with a view to injure *A*, or with a view to compelling *A* to forego some legal right, refuses to deal with *M* until *M* ceases to deal with *A*, *X*, because he acts maliciously or, in other words, from what is legally a wrong motive, exposes himself to an action by *A*. From this state of the law the following paradoxical result, among many others, apparently ensues. *X*, by doing an act which he has a right to do, namely, declining to deal with *M*, with the object of inducing *M* to do an act which *M* has a legal right to do, that is, ceasing to deal with *A*, may expose himself to legal penalties, and this because of the bad motive which leads *X* to do an otherwise legal act. It is not necessary to work out the numerous questions of casuistry to which this state of the law may give rise.

Secondly. It is probable, if not absolutely certain, that the law of conspiracy has a far wider scope than has been ascribed to it by very high authorities. If *X* exposes himself to an action by maliciously inducing *M* to break a contract or not to enter into a contract with *A*, it can hardly be doubted that a malicious combination for the same purpose by *X*, *Y*, and *Z* amounts to a conspiracy. Hence the doctrine maintained, for example, by Mr. Justice Wright, that the 'authorities on the whole strongly favour the view that a combination to injure a private person (otherwise than by fraud) is not as a general rule criminal unless criminal means are to be used,' becomes, it is submitted, almost untenable. If *X*, *Y*, and *Z* agree not to deal with *M* until he ceases to deal with *A*, and the motive for thus acting is to compel *A* to dismiss his workmen or to join a trade union, or to compel *B* to leave a trade union or to become or to cease to be a member of a political society, it cannot be said that they use criminal means for the sake of injuring, or, in other words, of putting constraint upon *A*, but they almost certainly are guilty of a criminal combination, i.e. of an indictable conspiracy, within

the principles implied or laid down in *Temperton v. Russell* and *Flood v. Jackson*.

Another learned contributor writes on the same case:—

‘We have been invited in this case to define malice, but I decline to tell trades unions,’ Lord Esher is reported to have said, ‘what is and what is not malice’ (*Flood v. Jackson*, 14 R. June, 151).

At first sight his lordship’s refusal appears unreasonable. When the guilt or innocence of trades unions and other persons depends on determining whether they have or have not been actuated by malice, it would appear reasonable to let them know what malice means. The term is certainly one which needs explanation, and may easily be misunderstood. If a judge were to say in reference to the crime of murder, ‘I decline to tell persons tempted to kill their fellow-men what is or what is not meant by malice aforethought, and therefore what is the state of mind necessary to constitute murder,’ he would hardly be thought to have adequately fulfilled his judicial duty.

Still on reflection it appears quite possible that Lord Esher’s words embody a sound principle. Malice is a term of which, to use the language of logicians, the denotation is more easily perceived than the connotation. It is easier, in other words, to see that certain acts are or are not malicious, i. e. done from wrongful motives, than to define the quality which makes up malice. No doubt the term is definable, but the want of an accurate definition works little practical harm, whilst a too wide or an inadequate definition might in one way or another give legal sanction to gross injustice. There is at any rate a great deal to be said for the policy of maintaining the principle that the malicious exercise of rights may, under certain circumstances, be a wrong, and of leaving to a jury, who act under the guidance of a judge, the responsibility of determining whether particular conduct is or is not, under given circumstances, malicious. [But juries are not responsible.]

X enters his yacht for a race, subject to the condition that while sailing under the entry he shall be bound by certain rules. By one of these the owner of any yacht which infringes any of the rules is ‘liable for all damages arising therefrom.’ *X*’s yacht, whilst taking part in the race, infringes one of the rules, and thereby damages *A*’s yacht, which is also entered for the race and taking part in it. *A* sues *X* for the whole amount of the damage done to *A*’s yacht. Has *A* a right of action against *X* for the breach of a contract with *A*?

This is the main though not the only point raised in *The Satanita*,

'95, P. 248, 64 L. J. P. 96, C. A. The Court of Appeal has unanimously held that there exists a contract between *A* and *X*. The decision is satisfactory in its practical result and is presumably sound, but the admission must be made that the Court in arriving at a convenient conclusion extended very widely, if it did not strain, the conception of a contract.

Two points betray the difficulty felt by the judges in holding that *X* was bound by a contract with *A*.

In the first place, they differ as to the time at which the alleged agreement was formed between *X* and *A*. Lord Esher considers that the contract was formed at the time when the competing yacht sailed and not before, and Rigby L.J. seems to be of the same opinion. Lopes L.J., on the other hand, holds that the contract was formed when an owner entered his yacht for the race.

In the second place, the judges are all of them compelled to hold that the yacht-owners entered into a twofold contract, one with the committee and the other with every other competitor, and here it is impossible not to trace something like the invention of a legal fiction, the aim of which is to show that whilst each owner did contract with the committee, he also—which is very doubtful—contracted with each of his rivals. The plain truth is that in this case, as in some others, the principle that no one has rights under a contract who is not one of the parties to it threatens to lead to the inconvenience that the person practically interested in the maintenance of an agreement is unable to sue for the breach of it. This inconvenience or injustice is in this instance avoided by the theory or pretence that there is a contract between each of the competing yacht-owners. A doubt suggests itself whether a certain kind of artifice or subtlety might not well be avoided by the Court's deliberately holding that a person interested in the fulfilment of a contract may sue for the breach thereof, even though he be a stranger to the contract. [This is done in some American States, but by no means universally approved.]

The Court of Appeal found occasion in *Baerlein v. Chartered Mercantile Bank*, '95, 2 Ch. 488, to explain the functions of the new Commercial Court. It is not a tribunal of natural or 'rough and ready' justice. The judges do not mean at this day to fly in the face of the experience which has taught us that in modern affairs rough justice is the unreadiest kind of all, or can be ready only by ceasing to be justice. The Commercial Court is simply an administrative device for expediting a certain kind of business by putting its conduct in the hands of 'a judge who is thoroughly versed in that particular department of business and of law' (per

Lindley L.J. at p. 493). We may add that it must depend largely on the intelligence of parties and their advisers whether the Court shall do the best that it is capable of.

Beljemann v. Beljemann, '95, 2 Ch. D. 474, C. A., enforces the wholesome principle that a partner is not bound to take precautions against his co-partner's possible frauds. Mutual confidence is the foundation of partnership, and every partner is entitled to rely on the implied warranty, or rather essential condition, of good faith. Hence the common defence in cases where a long time has elapsed: 'You might have known sooner if you had been diligent,' has no place here. In the rules of pure common law, and as between all men, we have the analogous principle that one is entitled to count on other people exercising ordinary care until the contrary appears. The law requires attention to one's own duties and not to other people's as well.

The income of a married woman subject to a restraint on anticipation, becomes free separate property and therefore property which a creditor may seize only when it has in fact come into her hands, and therefore such income cannot be made available in execution upon a judgment against her, even though it has accrued due at the date of the judgment. This is the point finally decided, at any rate as far as the Court of Appeal is concerned, by *Loffus v. Heriot*, '95, 2 Q. B. (C. A.) 212, which follows *Hood Barrs v. Cathcart*, '94, 2 Q. B. 559. The case appears to be in strict conformity with the whole tendency of the decisions determining the liability, or rather the non-liability, of a married woman's separate property when subject to a restraint on anticipation for her debts. Nor can it be said that the determination of the courts rigorously to preserve the protection given by such a restraint is otherwise than consistent with the language and the policy of the Married Women's Property Act, 1882. Sooner or later, however, the public and the legislature must consider a question which cannot be determined by the Courts. Is the policy of the Act sound? Is it really desirable that when women have, as regards property, obtained equality of rights they should not also incur equality of duties? The same question may be put in another shape: Is there any valid reason why a married woman should, except as against her husband, enjoy any protection or privilege not accorded to a feme sole? It were rash to answer these questions dogmatically. Still a lawyer cannot but reflect that the simplicity of legal rules is of itself a great advantage, and that the law would be greatly simplified if as regards property a married woman were placed in the same position as a man or a feme sole.

Meux v. G. E. R. Co., '95, 2 Q. B. 387, C. A., decides that, where a railway passenger takes as part of his personal luggage goods which are lawfully used by him as his personal effects, but are not his own, such as a servant's livery being the property of his master, damage to those goods by negligence of the company's servants is not only a breach of contract with the passenger (though perhaps not a breach for which he could recover substantial damages), but also an independent tort giving a right of action to the owner. This was not only a proper but a necessary conclusion after the line of recent cases, among which *Taylor v. Manchester, Sheffield and Linco. Ry. Co.*, '95, 1 Q. B. 134, is now the leading authority. Kay L.J. suggests ('95, 2 Q. B. at p. 393) that it may be otherwise where the passenger 'has no kind of interest' in goods carried by him among his luggage. The learned Lord Justice does not seem disposed to admit the soundness of such a distinction himself; and, in addition to his reasons, we may observe that we cannot understand how a man should not have some kind of interest sufficient for this purpose in whatever he takes about with him as personal luggage. He starts with possession at least, and, even if it is necessary for the owner to treat that possession as lawful, it is in the owner's election to do so. The owner's position would be more difficult if the goods were of a kind which the company professed not to carry as personal luggage, or to carry only at the owner's risk. In the case of the passenger being any kind of lawful bailee, e.g. a borrower, of such goods as railway companies do accept as personal luggage, no difficulty can arise after the present decision.

Level crossings have led to much litigation, but it has mostly been litigation relating to people being knocked down by passing trains. The point in *Boyd v. Gt. Northern Ry.* ('95, 2 Ir. Q. B. 555) was a novel one—undue detention at a level crossing. A local doctor in large practice arrives in his gig at a level crossing at 3.55 p.m., and is kept waiting for the gates to be opened until 4.15, not owing to any exigencies of traffic transit, but simple negligence on the part of the company—'stark insensibility,' as Dr. Johnson would say. For this bad twenty minutes the Court gave the doctor ten shillings damages against the company. Self-help in these emergencies will not do, for, as *Wyatt v. Gt. Western Ry. Co.* (34 L. J. Q. B. 204) decided, the level crossing is a thoroughfare only when the gates are opened by the company's servants. If you open them yourself you are in the position of a trespasser—possibly liable to grievous penalties under by-laws.

An employer's liability for the acts of his servants is in all conscience wide enough, but in *Gwilliam v. Twist*, '95, 2 Q. B. (C. A.) 84, 64 L. J. Q. B. 474, an attempt was made to give it an alarming extension. The coachman of an omnibus is drunk. A policeman orders him to give up driving. Thereupon the drunkard and the conductor authorize a passer-by to drive the omnibus home to the owner's yard, which is a quarter of a mile off. The stranger knows no more about driving than the drunken coachman, and drives over and injures a man in the street. An action is brought in a County Court against the owner of the omnibus. The judge holds that the action will not lie; a Divisional Court holds that it will, and the Court of Appeal supports the view of the County Court judge. The decision of the Court of Appeal appears to be right from every point of view. The driver, through whose negligence the injury was done, was not the servant of the owner of the omnibus. Neither the coachman nor the conductor had authority to appoint a driver. The coachman, further, was no agent of necessity; and the doctrine derived from the law with regard to the carriage of goods by sea as to agency of necessity has, one would suppose, no application to an omnibus. The astounding thing is that a Divisional Court should have neglected at once the suggestions of common sense, and, as it will seem to most persons, the obvious rules of law.

A communication relating to State matters made by one officer to another in the course of his official duty is absolutely privileged, and cannot be made the subject of a libel.

If, moreover, a libel is contained in a document of State brought into existence by the alleged libeller as a State official and for a State purpose, it cannot (*semble*) be produced in evidence in a court of justice, and even if no objection be taken to the production of such a document, it would be the duty of the judge at the trial to prevent its production.

These are the principles illustrated or established by *Chatterton v. The Secretary of State for India*, '95, 2 Q. B. (C. A.) 189. They are in themselves in conformity with justice and good sense. A foreigner would wonder that such principles should at this time of day be sufficiently doubtful for judicial discussion. A student of English constitutional law is, on the other hand, inclined to wonder at the slow-working sagacity with which our judges are gradually developing rules which introduce into England some of the sounder principles of foreign administrative law.

We might almost add a new maxim to English law, and say, 'omnia praesumuntur contra directorem,' such suspects have they now become. It is gratifying therefore to know that there are occasions on which directors will be credited with bona fides, unless there is evidence to the contrary: in other words, they may refuse a transferee of shares without giving their reason, and it makes no difference whether the power to refuse is a general one or limited to special grounds: *In re Coalport China Co.*, '95, 2 Ch. (C. A.) 404. In either case the power is fiduciary. The right to transfer a share is one of its most valuable incidents: on the other hand, a company must protect itself against insolvent or irresponsible transferees. The power of transfer was in old days much abused. Shareholders who saw a winding up imminent transferred for a trifle to a man of straw or paid him to take the shares, and if the transfer was an out-and-out transfer it was good, though a manifest fraud on creditors and shareholders. The common article requiring approval by directors reconciles very fairly the two interests. Directors acting under it cannot always give their reasons with safety to the company.

A great deal of strong language has been used lately about one-man companies. They are called, among other bad names, a fraud on the law, but they are within the letter of the Companies Act, 1862, and it is not at all certain—the question is still *sub judice*—whether they are not within the policy of the Act. There is no reason at all why a person should not trade with limited liability if the law will let him. Be this as it may, the one-man company illustrates the maxim 'fieri non debet factum valet.' The fallacy that it is to be treated as a sham because it is a fictitious person has been abundantly exposed. The company is a real person in law, capable until disincorporated of carrying on business and contracting. Its proper description—the true relation of the company to its promoter-vendor—so the Court of Appeal have now decided—is that of a trustee (*Broderip v. Salomon*, '95, 2 Ch. 323 (C. A.)), which means that the promoter-vendor must indemnify it, but this relation is and ought to be strictly confined to those cases, extremely rare, in which the company is a mere alias for the vendor-promoter: otherwise great injustice is done to a vendor.

The proviso in the Gaming Act, 1845, about money or valuable things deposited 'in the hands of any person to abide the event on which any wager shall have been made,' was intended to prevent people from making bets indirectly enforceable by interposing a stakeholder. It has long been settled that it does not prevent

a party to a wager from revoking the authority of a stakeholder, even after the event is decided, at any time before the money has been paid over to the winner. Another ingenious attempt to turn the proviso to the exact opposite of its real purpose was made by the defendants in *Strachan v. Universal Stock Exchange*, '95, 2 Q. B. 329, C. A., and, though not without novelty, it failed like its predecessors. The Court held that shares deposited with outside brokers as 'cover' on speculative transactions were not deposited with a stakeholder at all, and was prepared to hold that, even if they were, the case was within the existing authorities on the Act.

The complaint is common enough that the rules of law sink below the requirements of ordinary morality. It is well therefore to note that in some instances, and notably in all matters having regard to the relation between principal and agent, the requirements of the law are certainly on a level with, and in some cases rise above, the average morality of the mercantile world. *Robb v. Green*, '95, 2 Q. B. (C. A.) 315, is a good example of the way in which the Courts—and on this point be it noted there is no substantial difference between common law and equity (*Lamb v. Evans*, '93, 1 Ch. (C. A.) 218, 229)—insist on a servant or other agent acting with perfect good faith towards his employer. The manager of a business surreptitiously copies from his master's order-book a list of the names and addresses of the customers. After leaving his employer's service he uses the list for the purpose of soliciting orders on his own account. The Court of Appeal hold without hesitation that this conduct is a breach of good faith, and that the master is entitled both to damages and to an injunction.

Precatory trusts have for some time past been under a cloud. It is quite right that a man should not keep for himself what a testator meant he should hold for the benefit of another, but it is just as far from right that a man should have what is given to him taken away from him by annexing to it a trust, unless the trust is clearly created. In *In re Hamilton, Trench v. Hamilton* ('95, 2 Ch. (C. A.) 370) the words were 'I wish them (the legatees) to bequeath the same equally between the families of O. and P.' Such words have more than once been held to create a precatory trust; they would not be so held now, but it is not easy for modern judges to get out of the embarrassment caused by the liberal or lax creation of trusts by over-conscientious chancellors. An ingenious ruling of Cotton L.J. has emancipated them. You must look, says this doctrine,

not at the particular words, but at the whole will, to see whether a trust has been created. Thus is the law new made by judicial policy.

'The breath of heaven fresh blowing, pure and sweet,' in the words of Milton's Samson, is a blessing like that of the direct rays of the sun, but these bounties of nature men must forfeit when they crowd into cities. In populous city pent every man's natural right is qualified by that of his neighbours, so that this brave, overhanging firmament becomes to others besides Hamlet a pestilent congregation of vapours. The town-dweller can prevent his neighbour polluting the air, but he cannot prevent his building so as to obstruct the free passage of the general air of heaven and render it less fresh and salubrious (*Chastey v. Ackland*, '95, 2 Ch. 389, 64 L. J. Q. B. 523, C. A.). If the air comes in a defined channel a right to it may be acquired, not under the Prescription Act, 1832 (*Webb v. Bird*, 13 C. B. N. S. 841, the windmill case), but by immemorial user or user under some lost grant or agreement binding on the owners of the servient tenement. The rarity of litigation about air is remarkable, perhaps because light and air have generally gone together. Mr. Goddard, in his book on Easements, cynically ascribes it to our ancestors' indifference on the subject of ventilation.

A judgment is 'the voice of the recorded law,' and in the history of our law—the doctrines of merger and estoppel—there is much to encourage a superstitious veneration for a judgment, but a judgment by consent is something quite different. The Court in such a case has never applied its mind to the matters in controversy between the parties. It merely ratifies the consent. The judgment derives its vitality from the agreement, and if this agreement is founded on a common mistake as to a material fact, so as to be voidable by any of the parties, the judgment may be set aside, without any proof of fraud (*Huddersfield Banking Co. v. Lister*, '95, 2 Ch. 273, 64 L. J. Ch. 523, C. A.). One of the most satisfactory features about the modern administration of law is this getting at substance behind form. Formalism—'the philosophy of clothes'—is the deadliest vice of law as of religion.

The bad drafting of the Copyright Acts, which remain unconsolidated and amended though their defects have long been known, has given rise to much litigation that ought to have been needless. *Melville v. Mirror of Life Company*, '95, 2 Ch. 531, is the last example. Here the trouble arose from the Fine Arts Copyright Act of 1862

using the word 'author' in reference to photographs without any interpretation. Kekewich J. has held that the 'author' is the person who directs and controls the operation of taking the photograph as a whole, not necessarily the manual operator. So far well, but perhaps this does not exhaust possible questions. Who is the author if *A* designs the arrangement of a subject or group to be photographed, *B* poses the group from *A*'s design (*A* not being present), and *C* manipulates the camera? *C* is excluded by the present decision, but there is nothing to prevent *A* from having a word in the matter.

Our remarks about the drafting are not without judicial confirmation: the Copyright (Musical Compositions) Act, 1882, 'is a remarkable piece of drafting when looked into' (per A. L. Smith L.J., *Fuller v. Blackpool &c. Co.*, '95, 2 Q. B. 429, 440). In that case the Court of Appeal most rightly gave effect to the true intention of the Act, and discredited the view that a song becomes a 'dramatic piece' merely because it can be sung in costume and with dramatic accessories. That view would have restored to musical blackmailers the oppressive powers of which the Act of 1882 was meant to deprive them. We only regret that the Court did not expressly overrule some of the former decisions instead of leaving them in the air, so to speak, as decisions on matters of fact.

Charity in the legal sense has come to have a very wide signification. The relief of the poor is charity, the advancement of education is charity, the advancement of religion is charity, trusts for purposes beneficial to the community are charity: in other words, charity covers a multitude of things—the body, the mind, and the soul of the individual man, and also the interests of that body politic in which he lives and moves and has his being. A Home for lost dogs—the friend of man, is charitable (*In re Douglas, Obert v. Barrow*, 35 Ch. Div. 472), a gift to a volunteer corps is charitable—*salus reipublicae* being promoted (*In re Stratheden*, '94, 3 Ch. 265), but in *In re Nottage, Jones v. Palmer* (13 R. July, 165) the Court drew the line at a bequest for a yacht-race cup. It was ingeniously put as encouraging shipbuilding and seamanship, and thereby contributing to the defence of the realm, but this flight of fancy the Court in its interpretation of our prosaic law could not see its way to accept.

Another charity case—*In Re Foveaux* ('95, 2 Ch. 501)—opens a more difficult question. The gift in that case was to an antivivisection society. Here we are at once plunged in the midst of

a burning controversy. To one faction vivisection represents the highest interests of humanity, to the other faction it is anathema. Is the Court to arbitrate on the benefit to the community? Is it competent to arbitrate? One thing is manifest—whether anti-vivisection principles are or are not beneficial to the community—the testator *means* to benefit the morals of society by discouraging cruelty to animals, and with this test the Court in *In re Foveaux* was fain to be content. But will intent do? Benevolence, according to Lord Bramwell, is not necessarily charity: *Income Tax Commissioners v. Pemsel*, '91, A. C. 531, 564, 565. The people, as he points out, who brought faggots and the rack for heretics meant well; but was it charity? Joanna Southcote's case does not seem an authority in point. Lord Romilly allowed the charity there, not because Joanna meant well, but because he thought her works really were calculated to advance true religion. Can it be a charitable purpose in law to procure the total suppression of a practice which the legislature has sanctioned under regulation?

'Aliud est tacere, aliud celare.' The distinction is nice but real, and we have an illustration in the recent case of *Turner v. Green* ('95, 2 Ch. 205, 64 L.J. Ch. 539), where the plaintiff got the defendant to agree to buy a house without telling him that a certain summons had been dismissed, a fact which, if known to the defendant, would have prevented him entering into the agreement. The test in such cases is, is there an obligation to disclose—a fiduciary relation? If not, we may call it shabby, sharp practice, and so on—moralists may lament, but it will not prevent the person who has been judiciously reticent getting specific performance of the agreement. The only difficulty was caused by a decision of Lord Chancellor Manners in *Ellard v. Lord Landaff* (1 Ball. & B. 24; 12 R. R. 22). There a lessee got a renewal of leaseholds for lives without disclosing that the last life was *in articulo mortis*, but the surrender of the old lease was the groundwork for the treaty for the new, and the Lord Chancellor may well have thought there was a duty to disclose the falling of the life: it is evident he did from using the word 'suppression.' An ordinary vendor is not in any fiduciary relation to the vendee. He is not bound, for instance, in selling a mine to tell the purchaser that it has previously been worked and found unprofitable (*Haywood v. Cope*, 25 Beav. 10). *Caveat emptor* may not fulfil all that honour requires, but it is a healthy rule stimulating to diligence. The well-known early decision of the Supreme Court of the United States in *Laidlaw v. Organ* (2 Wheat. 178) is quite in accordance with this result.

An innkeeper has a lien on goods sent by an employer to a commercial traveller whilst staying at an inn, and this though the innkeeper knows when the goods are received that they are not the property of the traveller. This is the effect of *Robins v. Gray*, '95, 2 Q. B. 78. There is no reason, assuming that an innkeeper is to retain a lien on goods brought by guests for debts incurred by them, why we should quarrel with this decision. In such matters it is of importance that the rule maintained should be broad and simple, and should not be rendered uncertain by subtle distinctions. Is there, however, under the present condition of society, any reason why an innkeeper should have any special privilege beyond the rights of an ordinary creditor? Why should his position be different from that of the keeper of a lodging-house?

Alleged express desires of infants to deal liberally with their parents are dangerous things for a vendor to put his trust in when he wants to force a title upon a purchaser; and there is no magic in the customs of gavelkind to enable infants to dispose of their birthright for an improperly apportioned mess of pottage. It would have been no credit to the law if there had been any authority compelling Stirling J. to decide otherwise in *Re Maskell and Goldfinch's Contract*, '95, 2 Ch. 525. The case does not, however, afford any ground for supposing that the Court would examine the adequacy of the consideration as between an infant vendor under the custom and a purchaser not standing in any fiduciary relation to him.

A writer in the *Edinburgh Juridical Review* for July (p. 287), in an interesting 'current topic' on the Society of Comparative Legislation, takes occasion to mention some points in which he considers the new society might usefully take hints from the Scottish legal system, and among other things (public prosecutions, divorce, &c.) mentions a very current topic of English legislation at the present moment—Land Transfer. 'There is,' he says, in Scotland 'a system of registration of titles to land; why is this neither known nor appreciated in England, and why should the new society contemplate the study of some crude Torrens system, or another suited to the Antipodes, as an awe-inspiring example?'

While fully prepared to admit that there may be many particulars in which the 'comparative legislators' may do useful work in directing attention to Scottish laws and practices, we can hardly allow that Land Transfer is one in which the Northern example has either been forgotten by the comparatively small number of

people who have been accustomed to busy themselves here with that thorny subject, or that the Scottish registry system (which, by-the-by, is a registry of deeds, not of titles) appears to offer anything like the same advantages to the general public, either in cheapness, speed, or general convenience, as have already been secured, not only for the Antipodes by the Torrens system, but for such highly civilized countries as Prussia and Austria-Hungary by like systems of registration of title, or as are confidently promised to the English public by the advocates of recent Land Transfer Bills.

The Select Committee on Land Transfer of 1878-9 examined Mr. Douglas, a Scots conveyancing lawyer, and Mr. Brodie, W.S. and keeper of the Edinburgh Register of Sasines, at great length, and the latter gentleman also handed in valuable information, printed in Appendix V to the report showing the method of registration and conveyancing costs. The Committee's report refers frequently and most favourably to the Scottish register, but rightly classes it with the Irish and the Middlesex and Yorkshire systems of registration of deeds. Nor have modern writers neglected the Scottish conveyancing system. Mr. Morris's recent book on 'Land and Mortgage Registration,' p. 63, describes the Scottish Registry of Sasines, and Mr. Brickdale, in his 'Land Transfer in Various Countries' (pp. 60-66), gives a somewhat full description of the system from the point of view of practice, and lays considerable stress on it, as showing the high degree of usefulness which a well-devised and well-administered deed registry can be made to attain. He gives an example of the costs of an average Scottish conveyance for £1,000, which it appears would ordinarily be about £8 5s. for each party, *plus* 10s. or £1 for a search, paid by the vendor only. How this compares with ordinary English conveyancing on the one hand, and with registration of title on the other, may be gathered from Mr. Brickdale's note on the following page: 'The English "scale costs" would be, vendor £15, purchaser £15, total £30. In Middlesex or Yorkshire rather more. The Australian costs, including a search and new land certificate, would be about £2 without a lawyer, or about £5 with, but this is under registration of title. In the English Land Registry under the Act of 1875 the necessary costs of both parties would in an ordinary case be between £3 and £4—paid by the purchaser.'

There has been some uncertainty in professional opinion and even in judicial practice at various times on the question whether the 'Weekly Notes' are authority or not: see the dicta collected L.Q.R. iii. 356. Any one who will turn to the early documents of the Law

Reports in the late Mr. Daniel's book may see that the 'Weekly Notes' were not originally intended to be used as reports. Lord Justice Kay has declared himself against this practice in very plain terms, see his remarks in *Re Woodin*, '95, 2 Ch. at p. 318, 64 L. J. Ch. at p. 505. The recent alteration in the form of the 'Weekly Notes,' which makes them look less like reports than they formerly did, will have some effect, it is hoped, in the same direction. A note showing approximately what points have been dealt with, and giving a clue to further inquiry if desired, should not be taken, as a rule, even as a provisional substitute for a report of the case.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor except in very special circumstances ; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

THE VOCATION OF THE COMMON LAW¹.

TWELVE years ago, before I had formed any definite purpose of seeing with my own eyes and hearing with my own ears how the Common Law prospers on this side of the ocean, I exhorted those who heard my first lecture at Oxford to embrace all opportunities of greeting with no stranger's welcome those brethren from the West who come to visit our ancient seats of learning in the name of our common tongue and common doctrine. Converting Scripture to the use of the moment in a manner which would have needed no justification or excuse for a medieval lawyer, I then made bold to say: 'Benedictus qui venit in nomine legum Angliae.' Since that time I have done what little I could do to fulfil my own precept; little enough, in any case, in comparison of the reward. For within a year I found myself here, and I knew that the blessing had come back to me by this token among others: to wit, that before my acquaintance with my learned friend the Royall Professor was a quarter of an hour old we were deep in the question whether determinable estates in fee simple are known to the Common Law, and if so what are the properties of such an estate. Now I am again here, this time at your express bidding. The honour you have been pleased to do me is, as regards myself, one of the most gratifying I have ever received. But I should fail to esteem it at its full worth if I were to take it as confined to my own person, and did not accept it as a mark of your friendly affection and remembrance addressed in this hour of your festal gathering to the Bar and the Universities of the old country. And, as in private duty bound, I must especially rejoice in the office to which you have called me as being a fresh visible sign of the original bond that links this University, in name and in substance, with my own University of Cambridge in England. Standing on that venerable bond as a sufficient authority, I hold myself well entitled, here and now, to wish Harvard and its Law School continuance and increase of all good things in the name both of the profession at home and of the humanities which you most wisely deem an essential preparation for the study of the law.

It would be an idle task for me to praise the aims or the work of

¹ An Address delivered at the Commemoration meeting of the Harvard Law School Association, June 25, 1895.

the Harvard Law School in this presence. For, although it would in truth be sincere, praise coming from your guest could not be above the suspicion of partiality for any one who chose to suspect, nor therefore could it carry much weight with any one still standing in need of conviction. Still less would it befit this occasion to enter into a controversial discussion of actual or possible methods of legal instruction. Even if this Law School were not past the stage of apologetics, it would be an impertinence not to suppose you better prepared to defend your own system, and better capable of judging the time, season, and manner of any defence, than the most sympathetic of strangers. There is one product of your School, however, that stands apart and can be judged on its independent merits: I mean the Harvard Law Review. Now this Review has been in existence only eight years, and within that time its contributions to the history and science of our law have been of the utmost value. This is so far from being controvertible that it can hardly be called matter of opinion at all. No such record of profitable activity has been shown within recent times by any other law school; and although it is not necessary to commit oneself to the correctness of this statement beyond the range of English-speaking countries, I do not know that there would be any great rashness in making it universal. The singularly full and brilliant number of the Review published in honour of Dean Langdell's silver wedding with the School need not fear comparison with the festival collections of essays produced at any German University. The school that commands the services of such teachers and workers is at all events a living power. Let us pass on to consider in what manner of sphere it works.

The fact of such a meeting as the present implies a greater matter than the merits of even the best law school. Harvard has sent out her sons to practise in the courts of many jurisdictions, and they return to her in no way estranged. Coming from England myself, I am here, as a lawyer, more at home than in Scotland. We are not a congress come together to compare notes of different systems, if haply we may understand one another and profit by an exchange of novel wares; we are not only of one speech but of one rule; we talk freely of *our* law, the Common Law. This is one of the things we do so naturally that it seems too simple for discussion. And yet it is among the wonders of history, and may be not wholly without philosophical bearings. If, as a certain school would have it, law be merely the command of a sovereign power, that which the legislature of Massachusetts, or New York, or the United Kingdom, has thought fit to ordain or permit; if law be this and nothing more, then it would seem that the historical and empirical coin-

cidences between the commands it has pleased our respective political sovereigns to issue deserve much less importance than we have been accustomed to attach to them, and that there is no rational justification for your habit (existing, I believe, in all or nearly all the States) of citing English decisions more frequently than those of any other external jurisdiction¹. If on the other hand our traditions, our professional habits of thought, and our judicial practice are not foolishness, it would seem to be because law is not an affair of bare literal precepts as the mechanical school would make it, but is the sense of justice taking form in peoples and races. The law of our English-speaking commonwealths on which the sun never sets is one law in many varieties, not many laws which happen to resemble one another in several particulars.

Historians and publicists may discuss how far the political separation of these States from the British Crown was beneficial to the mother country and the emancipated family, what drawbacks were incident on either side to the advantages, and how far they were avoidable or not so. Lawyers may join them in regretting that the hostilities which at one time actually took place between the United States and the French Republic were not prolonged or not serious enough to bring about an Anglo-American alliance. For in that event we should not only have escaped the war of 1812, and learnt to respect one another as comrades instead of adversaries in arms; not only might some great fraternal victory have anticipated Trafalgar, and the Napoleonic legend have been cut short in its career of mischief; but the exploits of our combined naval strength would have directed the combined intellect of British and American jurists to the definition and improvement of public law. The law of nations would have been enriched with results, possibly of greater intrinsic merit, assuredly of more commanding authority, than any that we have yet seen. But a common enmity—which in this case turned out, as regards the United States, to arise from transitory causes—was not enough to found an alliance within so short a time of the first embittered separation. Anyhow, there is little profit to be had from straying into the dreamland of events that did not happen. And if any one should go so far on this line as to regret not only the manifestly regrettable incidents of our separation, but the fact that the independence of the United States was established fully, clearly, and absolutely, I do not see how any of us, whether American or English, can be free as a lawyer to go along with him. For without this perfect independence of local sovereignty and jurisdiction it would never have been made known how deep and firm is the organic unity of our legal institutions and science,

¹ See *Harv. Law Rev.* viii. 501-2.

which the shock of severance and a century of independent judicial and legislative activity have left, in all essential features, untouched.

We need no witnesses, least of all in an assembly of lawyers, to prove the persistence of this unity. But on this western side of the ocean it is more conspicuous than on the eastern. The very multifariousness of tribunals and legislatures under a federal constitution drives you back from the varying details of practice in this and that State to seek the fountain-head of principle in the central ideas of the law. To guide and encourage this process is among the functions of the Supreme Court of the United States; we need not attempt to measure it against the high constitutional and political duties assigned to that Court, but at all events it is mainly in virtue of this office that the Court is not only renowned but influential far beyond the borders of its actual jurisdiction. Even the Supreme Court of the United States, however, must in the long run be what the training and temper of the legal profession make it. And, if we are to know what the profession at its best will be in the coming generation, we still have to look among those who are teaching and learning. If there be any seat of learning where this ideal of the essential unity of the Common Law in all its dwelling-places has been wisely and diligently cherished, it is Harvard; if there be any teacher whose work has been steadfastly directed to this end, it is Mr. Langdell, whose long and excellent service to this School, and not only to this School, we are now happy to celebrate.

Mr. Langdell has insisted, as we all know, on the importance of studying law at first hand in the actual authorities. I am not sure whether this is the readiest way to pass examinations; that is as the questions and the examiners may be. I do feel sure it is the best way, if not the only one, to learn law. By pointing out that way Mr. Langdell has done excellently well. But the study he has inculcated by precept and example is not a mere letter-worship of authority. No man has been more ready than Mr. Langdell to protest against the treatment of conclusions of law as something to be settled by mere enumeration of decided points. For the law is not a collection of propositions, but a system founded on principles; and although judicial decisions are in our system the best evidence of the principles, yet not all decisions are acceptable or ultimately accepted, and principle is the touchstone by which particular decisions have to be tried. Decisions are made, principles live and grow. This conviction is at the root of all Mr. Langdell's work, and makes his criticism not only keen but vital. Others can give us rules; he gives us the method and the power that can test the reason of rules. And therefore, as it seems to me, his work has been

of a singularly fruitful kind, and profitable out of proportion to its visible bulk. Probably several of us have dissented, now and again, from this or that opinion of Mr. Langdell's. We may have been unable to concur in his deduction, or we may have thought that his reasoning was correct, but the received authorities were too strongly against him, and that he must be content with standing as the Cato of a vanquished cause. But none of us, I think, has ever failed to learn something even when he could not follow. For my own part, I have considered and reconsidered much of Mr. Langdell's criticism; I have more than once, on a second or third time of reflection, come round to think with him; at all times, whether going side by side with Mr. Langdell or withstanding him, I have felt, and the feeling has grown upon me with riper acquaintance, that appreciation of his point of view was sure to bring one nearer to the heart of the Common Law.

Now it may be said, and truly, that the range of any one man's work, even the best, is limited. We have to see whether it is typical, one of like examples present and to come. Permanent fruits can be assured only when the stock is multiplied. In the case before us we are encouraged in no small degree by the fact that Mr. Langdell stands eminent but by no means alone. The same spirit in which he has taught and criticized has been carried by others not only into the literary exposition but into the judicial development of the law. The name of my friend Mr. Justice Holmes will already be in your minds. In England we can perhaps speak, for the moment, less cheerfully. We are still lamenting the loss of two great judges who most worthily represented this universal and unifying spirit of our law (and I may the more fitly mention them here because you knew them), Lord Hannen and Lord Bowen. That loss is all the greater because the besetting danger of modern law is the tendency of complex facts and minute legislation to leave no room for natural growth, and to choke out the life of principles under a weight of dead matter which posterity may think no better than a rubbish-heap. And the continued divorce of the academical from the practical study of law in the old country is not, in my opinion, a good thing either for the Universities or for the Inns of Court. Nevertheless the main stream runs clear. Any one who follows the decisions of the House of Lords and the Court of Appeal from year to year will be satisfied, I think, that the science of law is still as much alive in England as ever; and, so far as my opportunities of knowledge have gone, I think you will be ready to warrant me in saying the same of the United States. Only we need, it seems to me, a little more self-confidence, a further touch of the quality that Mr. Swinburne has somewhere called 'an excellent arrogance.'

Our mediæval ancestors were certainly not lacking in this quality; they might have done well, perhaps, if they could have saved a little of their superfluity for us. I will endeavour to explain my meaning.

We have long given up the attempt to maintain that the Common Law is the perfection of reason. Existing human institutions can only do their best with the conditions they work in. If they can do that within the reasonable margin to be allowed for mistakes and accidents, they are justified in their generation. Even their ideal is relative. What is best for one race or one society, at a given stage of civilization, is not necessarily best for other races and societies at other stages. We cannot say that one set of institutions is in itself better or more reasonable than another, except with reference express or implied to conditions that are assumed either to be universal in human societies, or to be not materially different in the particular cases compared. It may perhaps be safe to assume, in a general way, that what is reasonable for Massachusetts is reasonable for Vermont. It would not be at all safe to assume that everything reasonable for Massachusetts is reasonable for British India, nor, indeed, that within British India what will serve for Lower Bengal will equally well serve for the north-west frontier. The first right of every system, therefore, is to be judged in its own field, by its own methods, and on its own work. It cannot be seen at its best, or even fairly, if its leading conceptions are forced into conformity with an alien mould. A sure mark of the mere handicraftsman is to wonder how foreigners can get on with tools in any way different from his own. Thus in England one shall meet people who cannot understand that the Scots do without any formal difference between law and equity; as, on the other hand, I have known learned Scots fail to perceive that the Common Law doctrine of consideration, being unknown to the law of Scotland, is yet founded on a hard bottom of economic fact which every legal system has to strike somewhere. We now realize that the laws of every nation are determined by their own historical conditions not only as to details but as to structure; and if we fail to attend to this we cannot duly appreciate the system as we find it at a given time. Many points of early Roman law remain obscure to us, notwithstanding more than half a century of the brilliant and devoted work of modern scholars, just because the historical conditions are matter of conjecture. In our own system the most elementary phrases of equity jurisprudence carry with them a vast burden of judicial and political conflict; and the range of activity left open to the Court of Chancery in Blackstone's time can be understood only when we have mastered both the strength and the weakness of the Action on the Case two centuries earlier. But history does

not exclude reason and continuity, no more than a man's parentage and companions prevent him from having a character of his own. Development is a process and not a succession of incidents. Environment limits and guides the direction of effort; it cannot create the living growth.

Hence it seems to follow that a system which is vital and really individual either must be resigned to remain in some measure inarticulate, or must have some account to give of itself that is not merely dogmatic and not merely external history, but combines the rational and the historical element. In other words, its aims are not completely achieved unless it has a philosophy; and that philosophy must be its own. This we recognize freely enough as regards other systems. It appears to us quite natural that Roman law should have its proper conceptions and terminology. We think no worse of the Roman law of property for starting from the conception of absolute ownership rather than the conception of estates, no worse of the Roman law of injuries by negligence for being developed by way of commentary on a specific statute and not, as with us, through judicial analogies of the simpler notion of Trespass, aided by statute only so far as the Statute of Westminster was necessary for the existence of actions on the case. What I desire to suggest is that, as we allow this liberty to others as matter of right, we should not be afraid of claiming it for ourselves; that, if English-speaking lawyers are really to believe in their own science, they must seek a genuine philosophy of the Common Law and not be put off with a surface dressing of Romanized generalities.

Take for example the Germanic idea which lies at the root of our whole law of property, the idea of Seisin. So much has this idea been overlaid with artificial distinctions and refinements in the course of seven centuries that it is possible even for learned persons to treat it as obsolete. Nevertheless it is there still. Actual enjoyment and control of land or goods, the recognition of peaceable enjoyment and control as deserving the protection of the law, the defence of them against usurpation and, at need, restitution by the power of the State for the person who has been deprived of them by unauthorized force: these are the points that stand in the forefront of the Common Law when we take it as presented by its own history and in its native authorities. Or, more briefly, possession guaranteed by law is with us a primary, not a secondary notion. Possession and rights to possess are the subject-matter of our remedies and forms of action. The notion of ownership, as the maximum of claim or right in a specific thing allowed by law¹, is not

¹ 'A man cannot have a more large or greater estate of inheritance than fee simple.' Litt. s. 11.

primary, but developed out of conflicting claims to possession and disposal. He is the true owner who has the best right to possess, and to set or leave others in his place fortified with like rights and exercising like powers over the thing in question. This is the line of development indicated by our own authorities. It leads us gradually from the crude facts to the artificial ideas of law, from the visible will and competence of the Germanic warrior to use his arms against any intruder on his homestead to the title, rights, and priorities of the modern holder of stock or debentures. It is impossible here to follow the steps; they form a long and sometimes intricate history. But is the process on the face of it absurd? Is there anything unreasonable about it? Can one assign any obvious objection against using the genius of our own laws as the most promising guide to their fundamental ideas? As it is, our students, not to say the books they put their trust in, are in little better plight than our learned ancestors of the eighteenth century. They too commonly start with a smattering of Roman doctrine taken directly or indirectly from Justinian, then find (as they needs must) a great gulf between Roman and English methods, and lastly make desperate endeavours to span it with a sort of magic bridge by invoking supposed mysteries of feudalism which in truth are in no way to the purpose: and they are still on the wrong side when all is done. Is there any real need for this trouble? I venture to think not. Let us dare to be true to ourselves, and, even if the first steps seem less easy (for everybody thinks he knows by the light of nature what ownership is, and resents being undeceived), we shall find increasing light instead of gathering darkness as we go farther on the way¹. We may smile at our medieval ancestors' anxiety to keep something tangible to hold on to, their shrinking from incorporeal things as something uncanny, their attempts, as late as the fourteenth century, to give delivery of an advowson by the handle of the church door; their Germanic simplicity may be called rude and materialistic; but at all events they did their best to keep us in sight of living facts. In some respects they failed; we cannot deny it. It is no fault of theirs that the arbitrary legislation of the Tudor period plunged us into a turbid ocean, vexed by battles of worse than fabulous monsters, in whose depths the gleams of a *scintilla juris* may throw a darkling light on the gambols of executory limitations, a brood of coiling slippery creatures abhorred of the pure Common Law, or on the death-struggle of a legal estate

¹ My learned friend Prof. Holland is conspicuous among the few modern theoretical writers who have had the courage to put Possession before Ownership (Elements of Jurisprudence, ch. xi.). Mr. Henry T. Terry, in 'Leading Principles of Anglo-American Law' (1884), has taken the same line yet more decidedly.

sucked dry in the octopus-like arms of a resulting use; while on the surface, peradventure, a shoal of equitable remainders may be seen skimming the waves in flight from that insatiable enemy of their kind, an outstanding term. There are some ravages of history that philosophy cannot repair, and the repentance of later generations can at best only patch.

Observe that when I defend our fathers I make no pretence of right to attack the Roman institutional system on its own ground. The history of Roman forms of action and Roman legal categories is quite different from ours. The Common Law has never had a procedure answering to the Roman Vindication. At first sight it may seem a small matter whether a man who finds his cattle in strange hands shall say 'Those are my beasts; it is no business of mine where you got them: I claim them because they are mine' (which is the Roman way), or shall reverse the order of thought and say 'Where did you get those beasts? for they were mine, and you have no business to hold them against me' (which is the Germanic way). Practically, no doubt, the result may come to much the same thing; but the divergence of method goes pretty deep. The formulas of the Roman republican period are already more modern and abstract than ours, and the Roman lawyers of the Empire, when they began to systematize, had to construct their system accordingly. The fact that their work, in its main lines, has lasted to this day, and has stamped itself on the modern codes of not only Latin but Teutonic nations, is enough to show that it was not ill done. Only when modern admirers claim universal speculative supremacy for the Roman ideas and methods need we feel called upon to protest. In that case we must remind the too zealous Romanizer that the masters of modern Roman law, notwithstanding their advantages in systematic training and in having a comparatively manageable bulk of material, are still not much nearer than ourselves to the attainment of an unanimous or decisive last word on Possession, or Ownership, or divers other fundamental topics.

One might produce further examples to show the danger of being in haste to abandon our own methods, and the still greater dangers that arise from well-meant attempts to improve them by mixing them with others. Thus our native Common Law procedure is in essence contentious; it is a combat between parties in which the Court is only umpire. Our equity procedure, a sufficiently acclimatized exotic but still an exotic, is in essence officious; it represents (though one cannot say that in modern times it has actually been) an active inquiry by the Court, aimed at extracting the truth of the matter in the Court's own way. No one has put

this contrast on record more clearly or forcibly than Mr. Langdell. Twenty years ago the authors of our Judicature Acts in England, men of the highest eminence, but trained exclusively in the Chancery system, went about to engraft considerable parts of that system on the practice of the Courts of Common Law. What came of their good intentions? Instead of the simplicity and substantial equity which they looked for, the new birth of justice was found to be perplexed practice, vexatious interlocutory proceedings, and multiplication of appeals and costs, so that for several years the latter state of the suitor was worse than the former. Repeated revision of the Rules of Court, and some fresh legislation, was needed before the reconstructed machine would work smoothly. But I may not pursue these matters here, and can only guess that perhaps American parallels might be found. I think I have shown that the Common Law has a right to its individuality, and, if we now turn to facts observable on this continent and elsewhere in order to see how that right maintains itself in practice, I do not think we can fairly be accused of taking refuge in empiricism.

The vitality of any coherent scheme of rules or doctrine may be tested in various ways. Among other tests the power of holding or gaining ground in competition with rivals, and the faculty of assimilating new matter without being overwhelmed by it, are perhaps as good as any. We shall find, I think, that in religious and philosophical debate each advocate concerns himself to justify the system of his choice according to these tests quite as much as to establish its truth or superiority by demonstrative proof. If I may use the highest example without offence, modern theology, so far as it is apologetic and not purely critical, pays much more attention to the general standing of Christianity in relation to modern ethics and civilization than to discussing the testimony of the apostles and evangelists as if it was a series of findings by a special jury. The plain man asks not what you can prove about yourself, but what you have done and can do; and the philosopher may perhaps find more reason in this method than the plain man himself knows. Applying it to the case in hand, we see that the Common Law has had considerable opportunities and trials both in the East and in the West in presence of other systems.

In British India the general principles of our law, by a process which we may summarily describe as judicial application confirmed and extended by legislation, have in the course of this century, but much more rapidly within the last generation, covered the whole field of criminal law, civil wrongs, contract, evidence, procedure in the higher if not in the lower courts, and a good deal of the law of property. Family relations and inheritance are the remaining

stronghold of the native systems of personal law, which are fortified by their intimate connexion with religious or semi-religious custom. It is not much to say that a modified English law is thus becoming the general law of British India, for if the French instead of ourselves had conquered India the same thing must have happened, only that the 'justice, equity, and good conscience' by which European judges had to guide themselves in default of any other applicable rule would have been Gallican and not Anglican. But it is something to say that the Common Law has proved equal to its task. The Indian Penal Code¹, which is English criminal law simplified and set in order, has worked for more than a generation, among people of every degree of civilization, with but little occasion for amendment. In matters of business and commerce English law has not only established itself² but has been ratified by deliberate legislation, subject to the reform of some few anomalies which we might well have reformed at home ere now, and to the abrogation of some few rules that had ceased to be of much importance at home, and were deemed unsuitable for Indian conditions. More than this, principles of equitable jurisprudence which we seldom have occasion to remember in modern English practice have been successfully revived in Indian jurisdictions within our own time for the discomfiture of oppressive and fraudulent money-lenders. The details of procedure both civil and criminal have undergone much revision and transformation in British India as in most other civilized countries and states: and there is doubtless much to be said of both success and failure in this department. But, since neither the praise nor the blame that may be due to modern codes of procedure can be said to touch the Common Law save in a very remote way, they do not concern us here.

There is another example in which you may take a neighbourly interest, that of the Province of Quebec. You are aware that the inhabitants of Lower Canada live in the guaranteed enjoyment of a law whose base is not English but French, and that their Civil Code, enacted not quite a generation ago, is avowedly modelled on the Code Napoléon. Nevertheless the Common Law (which of course prevails in the other provinces of the Dominion) has set its mark to some extent on the substance of legal justice in French Canada, and to a considerable extent on procedure. We find in the

¹ 'The Indian Penal Code may be described as the criminal law of England freed from all technicalities and superfluities' [this is perhaps a little too strong], 'systematically arranged and modified in some few particulars (they are surprisingly few) to suit the circumstances of British India.' Stephen, *Hist. Crim. Law of Eng.*, iii. 300.

² We cannot say that it has been received. Except in the limited jurisdiction of the Presidency towns, there has not been any 'reception' of English law in the proper sense.

civil procedure of Lower Canada, as we should expect, the decisory oath of the defendant, and other features of pleading and process common to all modern systems derived from Roman law; but we also find that in a large proportion of causes either party can demand a trial by jury. This may be said to show the Common Law competing against a powerful rival under the greatest possible disadvantage, or rather making itself felt in spite of being excluded from formal competition.

Perhaps the assimilation of new matter is a yet stricter test of vital power than tenacity on old ground, or prevalence over enfeebled rivals. In this case the great example is the incorporation of the law merchant with the Common Law, and the immense development of commercial law that accompanied and followed this process. Anglicized law merchant has become to a certain extent insular; but if we must admit so much to its disadvantage, I believe it is on the other hand a wider, richer, and more flexible system than is to be found in the commercial codes of France and her imitators, who have stereotyped mercantile usage and business habits as they existed in the seventeenth century. We have indeed preserved antiquated forms, but we preserve them because every clause and almost every word carries a meaning settled by modern decisions. A policy of marine insurance is to our current maritime law somewhat as a text of the Praetor's edict to a title of the Digest built upon it. And this does not prevent further development. The Courts cannot contradict what has already been settled as law, but the power of taking up fresh material is still alive, as we have been assured by high authority in England within the present generation.

Can we rest here in contemplating the past work and present activity of the Common Law? We cannot forbear, I think, to look to the future and consider what security we have for the maintenance of this vital unity. Ten years ago the Supreme Court of the United States declared, in a judgment of admirable clearness and good sense which I trust will be followed in England when the occasion comes, that in matters of general commercial principle 'a diversity in the law as administered on the two sides of the Atlantic . . . is greatly to be deprecated¹.' Shall this remain for all time a mere deprecation, appealing forcibly, no doubt, to the best sense of our highest tribunals, but still subject to human accidents? Is there not any way, besides and beyond the discussion of lawyers in books and otherwise, of assisting our ultimate authorities to agree? Would not the best and surest way be that in matters of great weight, and general importance to the Common

¹ *Norington v. Wright*, 115 U.S. 189, 206.

Law, they should assist one another? Certainly there are difficulties in the way of any such process: but is there in truth any insuperable difficulty? The House of Lords, as we know, is entitled to consult the judges of the land, though not bound either to consult them in any particular case or, when they are consulted, to decide according to their opinion or that of the majority. There is nothing I know of in our constitution to prevent the House of Lords, if it should think fit, from desiring the judges of the Supreme Court of the United States, by some indirect process if not directly, and as a matter of personal favour, to communicate their collective or individual opinions on any question of general law; nor, I should apprehend, can there be anything in the constitution of that most honourable Court or the office of its judges to prevent them from acceding to such a request if it could be done without prejudice to their regular duties. It would be still easier for the Privy Council, a body whose ancient powers have never grown old, and whose functions have never ceased to be expansive and elastic, to seek the like assistance. And if the thing could be done at all, I suppose it could be done reciprocally from this side with no greater trouble. Such a proceeding could not, in any event, be common. It might happen twice or thrice in a generation, in a great and dubious case touching fundamental principles, like that of *Dalton v. Angus*¹—a case in which some strong American opinions, if they could have been obtained, would have been specially valuable and instructive.

Could the precedent be made once or twice in an informal and semi-official manner, it might safely be left to posterity to devise the means of turning a laudable occasional usage into a custom clothed with adequate form. As for the difficulties, they are of the kind that can be made to look formidable by persons unwilling to move, and can be made to vanish by active good will. Objections on the score of distance and delay would be inconsiderable, not to say frivolous. From Westminster to Washington is for our mails and despatches hardly so much of a journey as it was a century ago from Westminster to an English judge on the Northern or Western circuit. Opinions from every supreme appellate court in every English-speaking jurisdiction might now be collected within the time that Lord Eldon commonly devoted to the preliminary consideration of an appeal from the Master of the Rolls. At this day there is no mechanical obstacle in the way of judgments being rendered which should represent the best legal mind, not of this or that portion of the domains that acknowledge the Common Law, but of the whole. There is no reason why we should not live

¹ 6 App. Ca. 740. Here an unanimous decision was arrived at, but it cannot be said that there was unanimity, or any decisive result, as to the reasons.

in hope of our system of judicial law being confirmed and exalted in a judgment-seat more than national, in a tribunal more comprehensive, more authoritative, and more august than any the world has yet known.

Some one may ask whether we look to see these things ourselves, or hope for them in our children's time. I cannot tell; the movement of ideas will not be measured beforehand in days or years. Our children and grandchildren may have to abide its coming, or it may come suddenly when we are least hopeful. Dreams are not versed in issuable matter, and have no dates. Only I feel that this one looks forward, and will be seen as waking light some day. If any one, being of little faith or over-curious, must needs ask in what day, I can answer only in the same fashion. We may know the signs though we know not when they will come. These things will be when we look back on our dissensions in the past as brethren grown up to man's estate and dwelling in unity look back upon the bickerings of the nursery and the jealousies of the classroom; when there is no use for the word 'foreigner' between Cape Wrath and the Rio Grande, and the federated navies of the English-speaking nations keep the peace of the ocean under the Northern lights and under the Southern Cross, from Vancouver to Sydney and from the Channel to the Gulf of Mexico; when an indestructible union of even wider grasp and higher potency than the federal bond of these States has knit our descendants into an invincible and indestructible concord. For that day is coming too, and every one of us can do something, more or less, to hasten it; of us, I say, not only as citizens, but as especially bound thereto by the history and traditions of our profession which belong to America no less than to England. If we may deem that the fathers and founders of our polity can still take heed of our desires and endeavours, if we may think of them as still with us in spirit, watching over us and per-adventure helping us, then surely we may not doubt that in this work Alfred and Edward and Chatham are well pleased to be at one with Washington and Hamilton and Lincoln. Under the auspices of such a fellowship we, their distant followers, are called; in their names we go forward; it is their destiny that we shall fulfil, their glory that we shall accomplish.

This, and nothing less than this, I claim here, an Englishman among Americans, a grateful guest but no stranger, for the full and perfect vocation of our Common Law.

FREDERICK POLLOCK.

THE RULE IN *DEARLE v. HALL*.

IN his famous judgment in *In re Hallett's Estate*¹, Sir George Jessel spoke as follows of the modern rules of equity: 'I intentionally say modern rules, because it must not be forgotten that the rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time, altered, refined, and improved from time to time. In many cases we know the names of the chancellors who invented them.' He illustrated his remarks by 'such things' as the separate use of a married woman, the restraint on anticipation, the modern rule against perpetuities and the rules of equitable waste. He might have added the rule in *Dearle v. Hall*², which is thus stated in the headnote to the report: 'A person having a beneficial interest in a sum of money, invested in the names of trustees, assigns his interest to *A*, who gives no notice thereof to the trustees: afterwards the same person proposes to sell his interest to *B*: the latter makes inquiries of the trustees and, receiving no intimation of any prior incumbrance, completes the purchase, and gives notice to the trustees: *B* has a better equity than *A* to the possession of the fund, and the assignment to *B* though posterior in date is to be preferred to the assignment to *A*.'

There is no trace in any text-book or reported case that any such rule or doctrine had been applied in the Court of Chancery before the decision in *Dearle v. Hall*³. In 1809 Lord Eldon, in *Wright v. Lord Dorchester*⁴, gave some countenance to the doctrine: upon an interlocutory application, and upon security being given by the puisne incumbrancer to refund the money if the ultimate decree should be against him, he dissolved an injunction restraining the legal holders of the fund from transferring it to the later incumbrancer, who claimed priority on the ground that he had given notice of his charge to the trustees; but the question did not again come before the Court at any subsequent stage of the cause, so that there is no record of any final opinion of Lord Eldon. Mr. Bell, who was counsel for the puisne incumbrancer in *Wright v. Lord Dorchester*⁵, told Sir James Wigram that the decision

¹ 1879, 13 Ch. D. at p. 710.² 1823, 3 Russ. 1.³ Ibid.⁴ 1809, 3 Russ. 49 n.⁵ Ibid.

in his favour was a great surprise to him, and Sir James Wigram added that he was satisfied from the terms of Lord Eldon's judgment in *Evans v. Bicknell*¹, that that great judge was of opinion that the mere omission of the earlier incumbrancer to give notice, the transaction being divested of fraud, was not sufficient to give priority to the later incumbrancer who gave notice². In 1814, in *Cooper v. Fynmore*³, Sir T. Plumer, when Vice-Chancellor, said, 'Mere neglect of notice is not sufficient to postpone the prior incumbrancer. In order to deprive him of his priority it is necessary that there should be such laches as in a court of equity amount to fraud.' It is true that in Sugden's Law of Vendors and Purchasers⁴ it is suggested that, 'notwithstanding the general rule "qui prior est tempore potior est iure," equity would prefer a subsequent purchaser who had given a proper notice to the trustees to a prior purchaser who had neglected to do so.'

Notwithstanding this absence of authority in favour of the rule, the cases of *Dearle v. Hall*⁵ and *Loveridge v. Cooper*⁶ were argued in 1823 before Sir T. Plumer M.R., and in 1827 before Lord Lyndhurst C. The facts in each case were simple, and raised distinctly the question whether as between successive assignees or incumbrancers of trust funds priority in date of the notice to the trustees was of more importance than priority in date of the assignments or incumbrancers. The cases were elaborately argued. Before the Lord Chancellor Mr. Sugden argued for the appellants in one case and for the respondents in the other, so that Lord Lyndhurst had the advantage of hearing all that could be urged by that consummate lawyer in favour of and against the proposed rule. For the appellants in *Dearle v. Hall*⁵ he argued (*inter alia*): The omission to give notice is not gross negligence: so long as the fund remains in the hands of the trustees the right to possession must depend upon priority of assignment without regard to priority of notice to the legal holders: neither the first nor the second assignee is in possession of the fund; it is still in the hands of the trustees, who are not entitled to retain it, but must pay it to either one or the other; the Court therefore must interfere, and it ought to interfere on behalf of the assignment which has priority in point of time: there is no end to the difficulties which must arise if once the Court departs from the plain rule that the prior equity is to be preferred, except where it is vitiated by fraud or negligence amounting to fraud. For the respondents in *Loveridge v. Cooper*⁶

¹ 1801, 6 Vesey, 182, 5 R. R. 251.

² *Meux v. Bell*, 1841, 1 Hare, 73.

³ 1814, 3 Russ. 60.
⁴ Ed. 1822, p. 700. The same view is expressed in Powell's Law of Mortgages, ed. by Coventry, p. 451.

⁵ 1823, 3 Russ. 1.

⁶ 1823, 3 Russ. 30.

he argued (*inter alia*): The purchaser of an equitable interest ought to affect the conscience of the trustees with knowledge of the purchase: by thus affecting the conscience of the trustees he gains a better and higher equity than a prior purchaser who dealt with the vendor only, and made no communication to the trustees: by requiring the purchaser, who desires to be safe, to give notice to the trustees, the vendor is deprived of the means of committing a fraud: in cases like the present the loss must be borne either by the first or the second purchaser: the latter (by giving notice to the trustees) has taken every precaution which prudence suggests to protect himself from fraud and to deprive the vendor of the means of defrauding others: it is the negligence of the former (in omitting to give notice to the trustees) which has enabled the vendor to commit the fraud; it is reasonable that the loss should be borne by him, whose negligence has occasioned it, rather than by an innocent party, who has exercised a degree of diligence, which would have saved him from being entangled in the difficulty if the other had done all that a prudent purchaser ought to do.

The latter argument was adopted by the Master of the Rolls and the Chancellor, and the authority of their decision, which Lord Macnaghten has described as 'perilously near legislation,' has never been questioned. But in many of the subsequent cases the facts have been neither so simple nor so clear as they were in the leading cases, and it has been necessary to ascertain the principles on which the rule is based. This has caused much diversity of judicial opinion. In some cases the giving of notice in respect of a chose in action has been likened to delivery of a chose in possession. In others the Court has insisted, on grounds of public policy or common sense, on the necessity of preventing frauds by beneficiaries who create successive incumbrances without disclosing the earlier ones. Sometimes the judges have said that no one shall claim the benefit of the assignment of a chose in action who has not done everything requisite to complete the title. Sometimes the Court has proceeded on the notion that the notice converts the trustees for the assignor into trustees for the assignee. But there can be little real doubt that Sir T. Plumer founded his judgments in the leading cases on the principle that it was the duty of the assignee to do all that he could to obtain the possession of the subject-matter of the assignment. 'If the assignee means to make his right attach on the subject-matter of the contract it is necessary to give notice, and unless he gives notice he does not do that which is essential in all cases of transfer of personal property. He must do that which is tantamount to obtaining possession by placing every person who has an equitable or legal interest in the

matter under an obligation to treat it as his property¹. The learned judge quoted at length from the judgments in *Ryall v. Rowles*², a case in Bankruptcy Law which decided that in order to avoid the operation of the 'order and disposition' section of the Bankruptcy Act then in force, 'in the case of a chose in action you must do everything towards having possession that the subject admits of.'

This view of the principle on which the rule in *Dearle v. Hall*³ was based is supported by Wigram V.-C., who, in *Meux v. Bell*⁴, said, 'Every one who takes the trouble to read *Dearle v. Hall*³ must be satisfied that the view of Sir T. Plumer was this: that to perfect the title you must do that which in equity is tantamount to the delivery of a personal chattel; and at last he uses the expression "Whenever persons treating for a chose in action do not give notice to the trustees or executors, they do not perfect their title."' In *Jones v. Jones*⁵ Shadwell V.-C. insisted that the true principle of *Dearle v. Hall*³ is that notice to the legal holder of the fund is necessary to complete the transfer of a chose in action. The authority of Jessel M.R.⁶ and Kay L.J.⁷ can be cited in support of the view that the reason why incumbrancers rank according to the dates on which they give notice is because such notice completes their title, and is tantamount to obtaining possession, for it is 'going as far towards obtaining possession as it is possible to go,' and notice is necessary to give a complete title *in rem* available against all the world, and not merely a title *in personam* available only against the assignor.

This principle has been somewhat lost sight of in some of the subsequent decisions, which have introduced qualifications of the original rule which show the truth of Mr. Sugden's prophecy, 'There is no end to the difficulties which must arise if once the Court departs from the plain rule that the prior equity is to be preferred except in cases of fraud.' The result of the later decisions is an excellent example of the somewhat haphazard fashion in which simple rules are, in the words of Sir George Jessel, 'altered, refined, and improved (?) from time to time.'

(1) Notice to one of several trustees is sufficient.

In *Willes v. Greenhill*⁸ Lord Westbury said, 'It is well established (whether rightly or wrongly) that upon assignments or mortgages of equitable interests in property held by trustees, the duty devolves upon the assignee or mortgagee to give notice to the trustees of the

¹ *Dearle v. Hall*, 1823, 3 Russ. p. 23.

² 1823, 3 Russ. 1.

⁴ 1841, 1 Hare, 73.

⁶ *In re Freshfield's Trusts*, 1879, 11 Ch. D. 202.

⁷ *Arden v. Arden*, 1885, 29 Ch. D. 708.

³ 1749, 1 Ves. sen. 348; 1 Atk. 165.

⁵ 1838, 8 Sim. 633.

⁸ 1861, 4 D. F. & J. 147.

assignment or mortgage. . . . The whole question (in this case) depends upon the kind of notice required, and I entirely adopt what was decided in the case of *Smith v. Smith*¹, and the reasons laid down in that decision. It was there held that notice to one trustee was sufficient.' The reason suggested is that a subsequent incumbrancer would be under an obligation to inquire of each one of the trustees whether there had been any prior dealings by the mortgagor with his interest, and therefore he would have to inquire of the trustee to whom notice had been given, and in this way would learn the truth.

(2) The notice may be informal, and may be received by the trustee from other sources than from the assignee or incumbrancer.

In *Lloyd v. Banks*² the trustee happened to read in a newspaper that his cestui que trust had presented a petition to the Insolvent Debtors Court. Lord Cairns reversed the decision of the Master of the Rolls, and held that the knowledge so acquired by the trustee was sufficient to prevent a subsequent assignee of the fund who gave formal notice of his assignment to the trustee from acquiring priority over the assignee in insolvency.

(3) It is immaterial for what purpose the notice was given.

The Court of Exchequer in *Smith v. Smith*¹ held that the mention of an assignment to one of the trustees of a fund, in casual conversation about other matters, was sufficient notice to all the trustees within the rule in *Dearle v. Hall*³.

(4) If in fact there is no notice of the prior assignment at the date of the subsequent assignment, it is immaterial whether the subsequent assignee does or does not make inquiries of the trustees.

This was decided in *Foster v. Cockerell*⁴, and the suggested reason is that inasmuch as there was no notice in existence, the inquiries would have been fruitless. The importance of this decision is noted later on.

(5) The rule in *Dearle v. Hall*³ does not apply to assurances or mortgages of real estate or of chattel interests in land.

It would be difficult to make out satisfactorily that in *Foster v. Cockerell*⁴ the contest was not between assignees of equitable interests in real estate. But though the rule in *Dearle v. Hall*³ was applied in that case by the House of Lords, it has never been doubted, since the decision of Shadwell V.-C. in *Jones v. Jones*⁵, that the rule has nothing to do with such cases.

If the judges in the later cases had kept steadily in mind the principle enunciated by Mr. Sugden in his argument for the

¹ 1833, 2 Cr. & M. 231.

² 1868, 3 Ch. 488.

³ 1823, 3 Russ. 1.

⁴ 1835, 3 Cl. & F. 456; 9 Bli. 376.

⁵ 1838, 8 Sim. 639.

respondents in *Loveridge v. Cooper*¹ and relied upon by Sir T. Plumer in his judgments, it would seem reasonable that he who has been diligent should be preferred to the man whose negligence has caused the difficulty. But the later decisions, and notably *Smith v. Smith*² and *Foster v. Cockerell*³, have given the go-by to all considerations founded on the conduct of the parties: the application of the rule in *Dearle v. Hall*⁴ at the present day depends not on the negligence or diligence of the competing assignees, but on the mere fact of notice, however informal or accidental. If a trustee chances to read the notice of an assignment in a newspaper, can it be said that the assignee has done all that he could to perfect his title? If the doctrine be supported upon another ground, that it is the duty of the assignee to give notice to the trustees in order to take the property out of the 'order and disposition' of the assignor, and to prevent him from repeatedly taking the same security into the market and inducing third persons to buy under the erroneous belief that he is still entitled to the property, it is assumed, firstly, that an assignee owes a duty to possible future assignees; secondly, that it is the absolute duty of an intending assignee to make inquiries of the trustees; and thirdly, that it is the duty of the trustees to answer the inquiries. Each assumption is incorrect. (1) An assignee cannot owe any duty to a possible future assignee, and if there is no duty, there cannot be any negligence. (2) It is immaterial whether the inquiries are or are not made if they would not have led to the discovery of a prior assignment. (3) It is no part of the duty of trustees to answer any inquiries by intending assignees of the beneficial interest in trust property. It was thought at one time that it was part of the duty of trustees to give correct information in answer to an inquiry whether they have notice of any prior assignments affecting the trust property⁵. But in *Low v. Bouverie*⁶ the Court of Appeal held that the trustees can refer the inquirer to the beneficiary himself, and that there is no trust or other relation between a trustee and a stranger about to deal with the beneficiary. After this decision, trustees will act wisely, in the great majority of cases, if they simply refuse to give an intending assignee or incumbrancer any information at all. But much of the language of Sir T. Plumer in *Dearle v. Hall*⁴ makes it extremely doubtful whether his decision would have been the same if he had realized that it was no part of the duty of trustees to answer such inquiries.

It would seem to follow from the later decisions that priority

¹ 1823, 3 Russ. 30.

² 1835, 3 Cl. & F. 456.

³ Lewin, Law of Trusts, 8th ed., p. 704.

⁴ 1833, 2 Cr. & M. 231.

⁵ 1823, 3 Russ. 1.

⁶ 1891, 3 Ch. 82.

depends, not so much on the incumbrancer completing his title by obtaining what is tantamount to possession of the fund, as on the receiving of the notice by the trustees, or on the conscience of the trustees being affected either by direct intimation or through other channels. If this be so, difficulties must arise on a change of trustees. In *Timson v. Ramsbottom*¹ it was held that if the prior incumbrancer gives notice to one of several trustees and the trustee who received the notice dies, a second incumbrancer who takes his incumbrance after the death of the trustee who received the notice, and gives notice of it to the surviving trustees, gains priority over the prior incumbrancer; so that the latter, who has done all that was necessary, according to *Smith v. Smith*² and *Willes v. Greenhill*³, to complete his title and to take possession of the fund, loses his priority because a trustee happens to die. Such an occurrence is clearly not relevant to the merits of any contest between the competing assignees. The suggested reason for this decision is that under the circumstances, any inquiries of the surviving trustees would not have discovered to the second incumbrancer the existence of the prior incumbrance. Lord Macnaghten has doubted the correctness of this decision, and in *Ward v. Duncombe*⁴ the House of Lords held that if the trustee who had received the notice of the first incumbrance was alive at the date of the second incumbrance, the fact that he afterwards died is immaterial, and does not deprive the earlier incumbrancer of his priority.

Counsel for the appellants in *In re Wyatt*⁵ submitted this puzzle to the Court of Appeal: There are two trustees, *A* and *B*; a first mortgage (1) is made, of which notice is given to *A*, but not to *B*. Then a second mortgage (2) is made, of which notice is given to both *A* and *B*. *A* then dies, and a third mortgage (3) is made, of which notice is given to *B*. (1) has priority over (2) (*Ward v. Duncombe*⁴). (2) has priority over (3), because in each case complete notice was given and priority of dates must settle the matter. (3) has priority over (1) (*Timson v. Ramsbottom*¹ and *In re Hall*⁶). The result is this circle: (1) prior to (2); (2) prior to (3); (3) prior to (1), which is a *reductio ad absurdum*. Few will think that Sir Edward Fry, who delivered the judgment of the Court, gave a satisfactory solution of the difficulty. In *Phipps v. Lovegrove*⁷ James L.J. pointed out the difficulties which may arise on the appointment of new trustees, inasmuch as it is no part of the duty of new trustees to inquire of the old trustees whether they have any notice of incumbrances, and in *Ward v. Duncombe*⁸ Lord Macnaghten said,

¹ 1836, 2 Keen, 35.² 1833, 2 Cr. & M. 231.³ 1861, 4 D. F. & J. 147.⁴ 1893, A. C. 369.⁵ 1892, 1 Ch. 188.⁶ 7 L. R. Ir. 180.⁷ 1873, 16 Eq. 80.⁸ 1893, A. C. at p. 395.

‘Certainly I can imagine nothing more inconvenient than that it should be possible to have a scramble for priorities on the appointment of new trustees. Nothing, I think, would be less likely to conduce to the security of equitable interests.’

It is noticeable how large a share Lord Lyndhurst had in establishing and developing the doctrine here examined. As Lord Chancellor he affirmed the decisions of Sir T. Plumer in *Dearle v. Hall*¹ and *Loveridge v. Cooper*², as Chief Baron he delivered the judgment of the Court of Exchequer in *Smith v. Smith*³, and Lord Brougham and he were the only law lords present to decide *Foster v. Cockerell*⁴ in the House of Lords. The rule now enforced in the Courts may be stated as follows: A subsequent assignee of the equitable interest in a trust fund can gain priority over a prior assignee by giving notice of his assignment to any of the trustees, unless at the date of the subsequent assignment there is in existence at least one trustee with knowledge of the prior assignment. The rule is purely artificial and technical; a perusal of the cases shows that the operation of the rule is quite apart from the merits of the successive incumbrancers, and often depends upon accidental circumstances. Lord Macnaghten is inclined to think that the rule has produced at least as much injustice as it has prevented⁵, and in the same speech he said, ‘The learned counsel for the appellants invited your lordships to define exactly the principle on which the doctrine of notice as established by the rule in *Dearle v. Hall*¹ depends. Speaking for myself, I think that would be a very hard task. I am not sure that the doctrine rests upon any very satisfactory principle. I am not sure that it has not been established at the expense of principles at least as important as any to which it has been referred⁵.’

There would be little difficulty in practice if the rule were, either that assignments of the equitable interest in trust funds must in every case rank in order of time, and that the assignee must rely upon the word of the assignor that he has good right to make the assignment, and that notice to the trustees is immaterial in a contest for priority, or that notice to the trustees of the assignment is a necessary and indispensable step to complete the right of the assignee to call upon the trustees to hand over the fund to him. In the former case the assignee would be compelled to rely upon the representations of the assignor. In the latter, formal notice would be given to the trustees at the time of the assignment, and a record of the receipt of the notice would be a necessary document of the

¹ 1823, 3 Russ. 1.

² 1833, 2 Cr. & M. 231.

³ *Ward v. Duncombe*, 1893, A. C. at pp. 391 and 393.

⁴ 1823, 3 Russ. 30.

⁵ 1835, 3 Cl. & F. 456.

title of the assignee. In neither case could there be any 'scramble for priority' by the successive assignees, based on the order in time of their notices to the trustees. As the rule is now interpreted in the Courts, it is immaterial to an assignee whether the trustees have or have not notice of his assignment unless one of the trustees receives notice, formally or informally, of a later assignment. If that be so, the prior assignee attempts to show from some casual conversation which may have taken place many years before, or some phrase in an old letter, that the trustee had or ought to have had at the date of the later assignment some knowledge or recollection of the first assignment. The facts of the cases show that the determining factor in awarding priority to one or other of the competing assignees is not seldom some accidental circumstance, which after many years is brought to light, and made to serve a purpose for which it was never intended.

The operation of the rule in *Dearle v. Hall*¹ is of great importance and far-reaching extent. It would be supposed that the legal advisers of an assignee or incumbrancer of the equitable interest in trust funds would not be satisfied until each of the trustees had received and acknowledged the receipt of formal notice of the assignment or incumbrance, but this precaution is omitted in many cases. The rule and the refinements or improvements of the rule are established by decisions which no Court can review, and it is not probable that the legislature will interfere in such matters. That being so, it behoves the assignees or incumbrancers of an equitable interest in trust funds either to trust to the honesty of the assignor or mortgagor, and not complain if he proves to be dishonest, or to do all that can be done towards perfecting their title or doing that which is tantamount to obtaining possession of the fund by taking the necessary steps to secure evidence that at each instant of time at least one of the trustees has knowledge of their assignment or incumbrance.

ERNEST C. C. FIRTH.

¹ 1823, 3 Russ. 1.

THE REFORM OF COMPANY LAW.

'We must not make a scarecrow of the law,
Setting it up to fear the birds of prey :
And let it keep one shape, till custom make it
Their perch and not their terror.'

THIS is what some persons believe has befallen company law. It has become the perch of promoters instead of their terror, and they want a new scarecrow set up or the old scarecrow made more formidable. In deference to this dissatisfaction at the supposed shortcomings of company law—at seeing the promoter in prosperity—the Board of Trade last November appointed a Departmental Committee to inquire into what amendments were necessary for the better prevention of fraud in relation to the promotion and management of trading companies, and to draft a bill for that purpose. No stronger Committee or more competent to the work could have been chosen. It was a picked body of legal and commercial experts representing the combined wisdom of the most eminent and experienced judges, barristers, solicitors, accountants, and men of business. The Committee have had to guide them more than thirty years' experience of the working of the Limited Liability Acts, and the labours of previous Committees. They have taken counsel with the Chambers of Commerce of London and the great industrial centres. They have investigated the law which governs trading companies in foreign countries; in Germany, in France, in the United States. They have discussed every point of suggested reform in all its bearings. The report of such a Committee—the outcome of so much careful consideration and inquiry—must needs possess the highest authority. At the outset of their Report the Committee frankly recognize that there are things which no legislation can accomplish. Legislation cannot protect people from the consequences of their own imprudence, recklessness, or want of experience. It cannot supply people with prudence, judgment, or business habits. Above all it must be cautious in meddling with the enormous interests now involved in the joint-stock enterprise of this country, and the free and healthy development of that enterprise. This last is the dominant note in the Report—the sense of responsibility in dealing with interests of such magnitude. The Committee have looked at the matter in a large and statesmanlike spirit. They have found that under the

co-operative principle, coupled with limited liability, which the Companies Acts embody, the trade of the country has prospered and is prospering exceedingly, that in every quarter of the globe English capital and English enterprise are busily engaged in useful and profitable industrial undertakings, in constructing railways and waterworks and tramways, in opening up and developing new territories, in mining and smelting and shipping and trading, in growing tea and curing bacon and printing newspapers—*quicquid agunt homines*—so that not less than a thousand millions is so embarked, while that of France and Germany combined is less by £315,000,000. They have found that this enterprise, and the capital which is the sinews of it, is owing in no small measure to the facilities which exist in this country for the formation of trading companies: they have found that the majority of companies, which are being formed at the rate of 2,700 a year, are honestly formed for carrying on a legitimate, though it may be a speculative, enterprise or business, and that the business of these companies is conducted with honesty and reasonable ability and judgment: they have found in the Companies Acts and the Acts amending it a complete code of company law, which has worked on the whole very well. And having found these facts, can we wonder that the Committee should feel strongly that legislation affecting interests of such magnitude demands the greatest care and caution? It would be strange indeed if with all this co-operative enterprise and world-wide spirit of adventure, this vast capital so lavishly poured forth, there were not a certain amount of wreckage, a fringe of fraud. The question which the Committee have had to ask themselves is, whether for the sake of defeating this fringe of fraud, of saving this wreckage, they are to recommend the legislature to curtail the facilities for the formation of companies—facilities which not only employ so much English capital, but bring foreign capital here—to embarrass the administration of companies, and to deter the best class of men from becoming directors. On this question—the most critical of all—the Committee have given no uncertain answer; indeed we may paradoxically say that the best they have done is seen in what they have—designedly—not done, the rocks they have avoided. They have taken up point after point of suggested amendment of the law, only to pronounce them impracticable, unworkable, or mischievous: they advocate no organic change in the law, no system of provisional registration or official investigation—indeed they strongly deprecate them—but they have appended to their Report a Draft Bill embodying recommendations of considerable importance, which will be closely scanned. Of these recommendations the most prominent are

those relating to the prospectus, the spider's web spun by the promoter. The ideal prospectus, as the Committee conceive it, should be a prospectus satisfying a high standard of good faith, disclosing 'everything which can reasonably influence the mind of an investor of average prudence.' This they regard as a counsel of perfection and impossible of attainment. Yet what saith the law? 'Those who issue a prospectus,' says Vice-Chancellor Kindersley in *New Brunswick Central Ry. Co. v. Muggeridge* (1 Dr. & Sm. 381), 'holding out to the public the great advantages which will accrue to persons who will take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as inducements to take shares.' The *uberrima fides* required of promoters is here, in this 'golden legacy,' as Sir W. Page Wood called it, stated as widely as the Committee could wish, but it amounts no doubt to little more than a counsel of perfection, that is, it is one of those duties known to our law as duties of imperfect obligation. Those who issue a prospectus ought no doubt to aim at satisfying such a high standard of good faith; but if they do not, what then? Is the person who has taken shares on the faith of the prospectus entitled, when he finds a material fact has been omitted, to repudiate his shares? By no means. To entitle him to do so there must be a material misrepresentation—as James L.J. put it in *Gover's case* (1 Ch. D. 189), a false statement or an omission amounting in effect to a false statement. The Committee have been sorely tempted—happily they have not succumbed to the temptation—to propose to make the validity of a contract to take shares depend, not only on the absence of misrepresentation, but on the disclosure of every material contract and circumstance in the prospectus. This would have been disastrous, for every discontented shareholder could have ferreted out some undisclosed fact and said it would have influenced his mind had he known it. The Committee have contented themselves with recommending that certain specific matters should be disclosed in the prospectus. We turn to the Draft Bill, and we find what these specific matters are (s. 14). They number more than half the letters of the alphabet, the contents of the memorandum of association, the number of shares, the names and addresses of directors, the minimum subscription for going to allotment (of which more anon), the number of shares and debentures issued as fully paid to any promoter and the consideration for which it is

to be paid, the amount reserved for working capital, and the dates, parties, and short purport of every material contract, *cum multis aliis*. But the subsection which is intended to hit promoters hardest is (f). 'Every prospectus of a company must state (f) the names and addresses of the vendors of any property purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of publication of the prospectus; and where there is more than one vendor, or the company is a sub-purchaser, the amount payable in cash shares or debentures to each vendor.' Then s. 14 (2) goes on to define a vendor.

'For the purposes of this section every person shall be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase or for any option of purchase of any property to be acquired by the company in any case where—

(a) the purchase-money is not fully paid at the date of publication of the prospectus; or

(b) the purchase-money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus; or

(c) the contract depends for its fulfilment on such issue.'

The design of this section is, of course, to put a stop to what is undoubtedly one of the worst evils of promotion, the overloading of the price to be paid by the company. It is what the Committee call 'stripping the mask off the nominal vendor.'

These sections are well meant and admirably drafted, but the policy of them is very questionable. They overload the prospectus—the size of which is limited to three ordinary pages—with an immense amount of matter really irrelevant, but which the directors will be afraid to leave out. They compel a vendor to do what no ordinary vendor is obliged by law to do—disclose the price at which he bought, and so prejudice in the eyes of the public a property which he may have bought at a bargain. They put upon the shareholders or intending shareholders that which is properly the business of the directors, namely, to determine the real value of the thing which the company is buying and the price it ought to pay—a matter for which the public are wholly incompetent; but above all they constitute a very serious danger to directors, a very alarming scarecrow.

Under the Directors' Liability Act, 1890, if a statement of fact in a prospectus is untrue, the director has the onus cast upon him of showing that he had reasonable grounds for believing it to be true,

and did in fact believe it true. Failing his doing so, he is liable to an action for deceit. By the Draft Bill he will be liable if he merely fails to disclose one of a number of multifarious and complicated transactions. Section 14 goes on:—

‘In the event of non-compliance with any of the requirements of this section with respect to a prospectus, any person aggrieved shall be entitled to compensation from any director or promoter of the company who is a party to the issue of the prospectus, unless that director or promoter proves that—

(a) as regards any matter not disclosed he was not cognizant thereof, and could not with reasonable diligence have discovered it; or

(b) the non-compliance arose from any honest mistake of fact on his part.’

The remedy is not rescission, but damages against the directors, and damages at the suit, it may be, of every shareholder in the company. Under the Directors’ Liability Act the directors have been chastised with whips, here they are to be chastised with scorpions.

And for whom are these penal provisions against directors to be passed? Who are these much talked of, much paraded victims of fraudulent prospectuses? It is a remarkable phenomenon—loud and angry as is often the railing accusation brought against directors by disappointed shareholders—how rare are actions of deceit against directors. They were few before the Directors’ Liability Act, they have been fewer still since, notwithstanding the increased stringency of the law, and the reason is that there are in fact very few bona fide victims of so-called fraudulent prospectuses. Investors seldom go by the statements in a prospectus at all, entering methodically, that is to say, into the business details of the enterprise. They know that the prospectus is only as Lord Chelmsford called it, ‘a flourishing description of prospective advantages,’ and as such they take it. When they are asked to put their finger on any particular paragraph and say, ‘It was that which induced me to take the shares,’ they generally fail; if they specify one it is usually under stress of legal advice. Some recipients of a prospectus may rely on the names of the directors, others on the recommendation of a friend or a broker; what the many go by is that hope which springs eternal, and which before and since Pope’s and Campbell’s time has told many a flattering tale. They put their money on an attractive speculation—to win a premium, not as an investment—just as they would take a ticket in a lottery or put down a five franc at roulette. To say this is not to extenuate misstatements by directors, but only to point the truth

that the supposed victims of directors' villainy are in fact victims of their own carelessness or cupidity, and as such are not entitled to have the law wrested for their behoof, or the sword of justice specially sharpened for their redress. On this point: Given disclosure, will it be used? Mr. Harold Brown, in his excellent Memorandum, remarks that in all his experience he has only had fifteen persons to inspect contracts offered for inspection, and five of these wanted inspection for ulterior purposes. 'How,' he pertinently asks, 'can any perusal of contracts or reports enable a parson, a widow, or a spinster, to form an opinion worth anything as to investing in a bank, brewery, trust, mine, or other enterprise?' 'The prospectus of a company of any importance,' he adds, 'cannot in my judgment ever be much more than a general outline of the circumstances connected with the formation of the company. It ought to be a fair and bona fide statement in the judgment of the directors of the main facts and general prospects of the company, and ought not to mislead either by statement or concealment, but to make directors responsible for anything except fraudulent misstatement or concealment would, in my opinion, be a grave mistake. Such a provision would not deter the fraudulent, but would prevent the best men from becoming directors, and would prevent the owners of the best commercial businesses from converting them into joint-stock companies.' This deliberate opinion derives great weight from Mr. Harold Brown's large practical experience.

The best security—the only security—for sound management and success in company enterprise is that trustworthy men—men of ability, integrity, and position—shall be on the board. If they are, the interests of the company will be safeguarded. If they are not, if the directors are men who will betray the interests of the company—commit it to improvident contracts and play into the promoters' hands—all other safeguards are of little avail.

It is the same with the question of the subscription of capital. There is no doubt that going to allotment on an insufficient subscription has frequently brought a company to ruin. Several instances were quoted in the last winding-up Return. In these cases the money ought no doubt to have been returned to the shareholders. But it is one thing to say this and another to fix, as the Draft Bill does, an amount of subscription which shall fetter the directors' discretion. The amount required is pre-eminently a matter for the directors' discretion, and as a safeguard the statutory conditions are likely—almost certain indeed—to prove illusory. The professional promoter will find no difficulty in complying with them. It is to be remembered that if directors proceed to allotment on a manifestly inadequate subscription, that is a misfeasance for

which they may be held liable in damages by the company or by the liquidator in the winding-up.

One of the proposed amendments to which the Committee say they attach importance is making the first statutory meeting of the company a reality. The more eager reforming spirits among the Committee were for postponing the completion of all contracts by the company with promoters and vendors till adopted by the shareholders at the statutory meeting, but wiser counsels prevailed. The Committee saw that a hostile or discontented section of shareholders might in such a case wreck the enterprise altogether, or at any rate put an unjustifiable pressure upon vendors; and why, say the Committee, should we hamper and embarrass the completion of honest contracts in the majority of cases, in order to prevent a problematical wrong in the small minority? True to this principle of not jeopardizing the prosperity of joint-stock enterprise in order to punish a small knot of unscrupulous company-mongers, the Committee have contented themselves with putting the statutory meeting three months earlier, that is, within a month of the company's registration, and furnishing each of the shareholders seven days before with a copy of the report guaranteed by the directors and auditors. With this in their hands the shareholders will be in a condition to review their position and prospects, to claim rescission of contracts with vendors or promoters, if necessary, or resolve, should the outlook be desperate, to wind up. Whether shareholders use this opportunity or not remains to be seen, but if they neglect it they will only have themselves to thank if things go wrong.

One very common and unfortunate incident in winding up is the discomfiture of unsecured creditors. 'The object of the winding-up provisions of the Companies Act, 1862,' as Lindley L.J. said in *In re Oak Pitts Colliery Co.* (21 Ch. D. 329), 'is to put all unsecured creditors upon an equality and to pay them *pari passu*,' and with this object the machinery of the Court is set in motion. This is the signal for the debenture-holders, who at once swoop down and claim every farthing of the assets, after-acquired property, book debts, and uncalled capital, and the liquidator's duty resolves itself into calling up the uncalled capital and handing it over to the debenture-holders or their receiver. It is the same with any claims the company may have against its directors for misfeasance or moneys misapplied. Such claims are an asset covered by the debenture-holders' charge, and if the liquidator takes expensive proceedings to assert such claims the fruits still belong to the debenture-holders. This is a genuine grievance for unsecured creditors, and there are two modes of remedying it. One is to limit a company's borrowing power, and the other to give full notice to creditors of all mort-

gages and charges by the company. There is a good deal to be said for a borrowing limit—especially for prohibiting a company from charging its uncalled capital—as Vaughan Williams J. has pointed out in his Addendum, because in conceding the privilege of limited liability the legislature seems to have made it the price of the privilege that this minimum shall be available for the payment of unsecured creditors. But the Committee have, after due consideration, wisely negatived the proposal to limit a company's borrowing power, and prefer to rely on an efficient system of registration of mortgages and charges. For this purpose they recommend that a public register of mortgages be kept at the Joint Stock Registry, and that 'all charges on uncalled or unpaid-up capital, and all floating charges and all securities for any series of mortgage debentures, and all mortgages on chattels which would require registration under the Bills of Sale Acts if made by an individual trader' should be registered, and that any unregistered mortgage or charge requiring registration be invalid as against liquidators and creditors; but they do not recommend a general register of all mortgages and charges made by a company. This partial system of registration is not satisfactory: it must prove misleading, and it is obvious that the Committee were only driven to it, because there are liens, charges, and equitable mortgages of daily occurrence in a company's business, such as borrowing from bankers on deposit, which it would be extremely inconvenient to register at Somerset House. But why is Somerset House to be preferred to the company's own office? Section 43 of the Companies Act, 1867—the registration of mortgages section—has, say the Committee, become almost a dead letter—the Committee hint because creditors do not like to avail themselves of their right of inspection at the company's office if they desire to retain business connexions with the company. But surely this is false delicacy. If a man is going to trust a company to a large amount, elementary business caution would lead him to say, 'Let me see to what extent the company's property is charged. Show me your register of mortgages.' A refusal would of course put him off. This is what a person lending to a company does as a matter of course, and why not an intending creditor, if he wishes to be safe? There is no evidence that creditors who do so inquire ever experience any opposition on the part of the company. Avoiding a charge for non-registration is a strong proceeding, but the owner of the charge can see to registration as easily at the company's office as he can at Somerset House; in the former case, moreover, he would have an action for negligence against the directors—a liability which could well be relied on to secure efficient registration. The real explanation of s. 43 being a dead letter is not

delicacy, but the supineness or sanguineness of trade creditors. Business men will not take the trouble to investigate the solvency of a company they are trusting when the matter is an ordinary trade contract. It is not worth their while to do so. They presume solvency while the company is a going concern, and they will continue to do so whether the register of charges is at the company's own office or at Somerset House.

The Committee have not gone further and recommended that the balance-sheet as well as the charges of a trading company should be filed at the Registry of Joint Stock Companies. They accept the principle that the true financial position of the company should be honestly disclosed to shareholders not less than once a year, but only to shareholders—not for public use. Indeed it is difficult to see what business the outside public has with the business details of a trading company, any more than of a private partnership. Banking companies and insurance companies are in a different position. Rightly viewed, they are trustees or quasi-trustees of large funds deposited with them by the public, and the legislature may very well insist on their filing a public balance-sheet; but to require the same of all trading companies would be an unwarrantable interference with the right of free trading. Neither would it do the public any good, because publication of a balance-sheet, without publication of the details of the chief items of which it is composed, would be of no value, while publication of detailed information would seriously prejudice the company with its rivals in trade. The private balance-sheet recommended by the Committee is a novelty, and likely to prove useful both to shareholders and to auditors. The provisions as to auditing accounts in s. 33 of the Draft Bill have been carefully considered by the eminent accountants on the Committee, and ought to prove satisfactory. The duty of an auditor as there defined tallies almost exactly with the definition lately laid down independently by the Court of Appeal in *In re London & General Bank*, '95, 2 Ch. 166 (C. A.).

'An auditor,' says Lindley L.J. in the case referred to, 'does not discharge his duty in merely examining the books. It is his duty to make such inquiries as will satisfy him that the books disclose the true position of the company.' By the Draft Bill the auditors 'shall examine the balance-sheet and other accounts presented to the members of the company, and shall report to the members of the company that so far as the auditors are in a position to form an opinion the balance-sheet and accounts have been drawn up in accordance with the provisions of this Act, and, when taken together with any explanations attached thereto, present a correct view of the state of the company's affairs.'

The words in italics touch the weak spot; for auditors, unless they are to value the assets, are entirely dependent on what information the directors think fit to give them. An auditor finds a loan, for instance, in a bank's books. The directors tell him it is made against a deposit of securities, and a bundle of title-deeds is shown him. How is he to form an estimate of the value of the security, and consequently of the company's true position? Yet if he does not what is the audit worth?

One recommendation of the Committee is certainly startling—the repeal of s. 25 of the Companies Act, 1867. This section has proved most salutary. It has secured that the company's capital shall not be a mere sham contributed in any commodity with no certain criterion of value. It has been the one safeguard which has baffled the ingenuity of the fraudulent promoter. How will the promoter rejoice, how will the uncircumcised triumph at its repeal? It is said to lead to hardship—that persons have sometimes to pay twice over for their shares owing to a mere inadvertence in not registering the contract; but the alleged hardship has been reduced to a minimum. If there has been no registration in time, owing to a mere mistake of fact or law, the Court can and always does grant relief where the company is going and solvent, and even where it is in winding up. *Vaughan Williams J.* has, in a recent case, allowed rectification of the register by cancelling the shares and reissuing them on the terms of the applicants' providing for debts and liabilities incurred between the registration of the contract and the date of the notice of motion to rectify.

In proposing to sanction the payment of commission or brokerage the Committee have made a concession to a commercial practice which has been recently recognized as legitimate by the Court of Appeal. If a company may pay out of its funds for printing and advertising its prospectus to induce people to take up its shares, there seems no reason why it should not also pay brokerage for placing its shares, provided the shareholders are told of what is being done. But the commission must be reasonable—all depends on that—otherwise the more desperate the company's undertaking the larger and the more ruinous must be the commission paid to underwrite the capital. There are many minor reforms which the Committee advocate—as to directors' qualification, summoning extraordinary general meetings, consolidating the provisions as to reduction of capital, facilitating applications to the Court in voluntary winding up, the revision of Table A, not allowing guarantee companies to have a share capital except under defined conditions, winding-up companies whose certificate of incorporation has been obtained by fraud: on these there will be little or no controversy.

But we must not expect the millennium. Some amount of fraud, some amount of wreckage, we must always have. All that can be done is to reduce it to a minimum. The Report of the Committee contains valuable suggestions to this end : whether they will be found feasible by the legislature remains to be seen : but whether they are or not we rise reassured from the perusal of this Report. The harvest of joint-stock enterprise is abundant, the birds of prey are not numerous, and the old scarecrow touched up a little will do very well.

EDWARD MANSON.

THE LAND TRANSFER ACT, 1875¹.

IT is with some diffidence that I publish this article, for while I am one of the few conveyancers who strongly approve of registration of title, I differ from most of the advocates of registration, inasmuch as I think that it would be unsafe to render registration under the Land Transfer Act, 1875, compulsory. I own some land which I wish to sell in lots for building; I went carefully into the question whether it was advisable to register, and I came to the conclusion that the expense of registration would be absolutely wasted, and that I should not be able to deal with my land for building purposes after registration as easily as I can at present.

While I believe that compulsory registration would be beneficial, it is not my intention to discuss its merits in this article. I shall confine myself to stating some objections to the Land Transfer Act, 1875, and to suggesting some amendments to it. If the Act is made compulsory in its present form, an agitation will I fear be made, as soon as its effects are perceived, not only for the repeal of the Act, but against registration in any form. What a storm would arise if Nonconformists found that it was difficult, if not practically impossible, for them to buy a site for a chapel in a district where registration was compulsory; or, to put a case which may possibly happen without compulsion, if a man who had never heard of registration suddenly discovered that his land was fraudulently charged with a sum of money by way of mortgage!

The Land Transfer Act, 1875, deals not only with the mechanism by which registered land is to be transferred, which is a mere question of procedure, but it also makes many changes in substantive law, as affecting registered land only. Probably these changes were made under the belief, which I consider erroneous, that they were essential to registration. I am of opinion, and I shall endeavour to show, that most of these changes in the substantive law are mischievous, either because they give facilities to fraud or because they hamper the ordinary dealings with land:

¹ I shall refer to the Report of the Committee on Land Titles and Transfer, 1878, as L. Tr. 1878, to the Report of the Committee on Land Titles and Transfer, 1879, as L. Tr. 1879, and to the Report of the Committee on the Land Transfer Bill, 1895, as L. Tr. 1895. The numbers following the year are those of the questions referred to.

I may add that if they are beneficial they ought to be extended to all land whether registered or not.

The sixty-fourth paragraph of the Report of the Land Transfer Commission, 1870, states that—

‘The problem is not to find a perfect system of land transfer, recording with mathematical accuracy the nature and extent of the land, and every interest in it, so that the record shall absolutely dispense with the necessity of ordinary examination and inquiries, but to find a system, which not impairing the present security of owners or purchasers, and not exonerating the purchaser from the easy and obvious task of looking at the outward and visible state of the property, and making inquiry of persons in outward and visible possession of it, shall enable the legal ownership to be readily passed from hand to hand, and dispense with the necessity of inquiring after invisible equities and interests whose only evidence is contained in private documents.’

The Land Transfer Act, 1875, offends against the canons laid down in this report inasmuch as it impairs the existing security of owners, and it endeavours to exonerate a purchaser from looking at the property and making inquiry of persons in outward and visible possession of it.

The safeguards against fraud on a sale or mortgage of unregistered land are the following:—

(1) The purchaser must see that possession goes with the title [i. e. is consistent with the title shown by the vendor].

(2) The purchaser must see that the deeds are in the proper custody.

(3) He has the right to have the conveyance executed in the presence of any persons whom he chooses.

None of these safeguards exist in the case of a transfer of registered land.

The first of these safeguards requires a somewhat lengthy explanation.

Where *A* agrees with *B* to purchase property from him, *A* has to ascertain that the property belongs to *B*, as, if it does not, *A* will take nothing by a conveyance from *B*. If the thing purchased be incorporeal, this is the only matter to which *A* need attend; but, if it be corporeal, *A* must also ascertain that *B* will be able to put him into possession on completion. It follows that if *B* is not in possession *A* must inquire from the person in possession whether he will give possession to *A* on completion, and if he declines to do so *A* must decline to complete.

These rules apply, with some exceptions that I shall not discuss, to purchases of corporeal property of every nature, both real and personal. It may be objected that where a purchase is made in

a shop no purchaser ever inquires whether the things sold belong to the shopkeeper. The answer appears to be that in most cases the purchaser trusts to the honour of the shopkeeper. Cases however have occurred where the purchaser of corporeal personal property from the person in possession has been defrauded owing to his not having taken the precaution of ascertaining that it belonged to the vendor. (See *Helby v. Matthews*, '94, 2 Q.B. 262, reversed in D. P., '95, A. C. 471.) On the other hand, a purchaser from the owner of goods which he has bailed, and of which he is consequently out of possession, takes subject to the rights of the bailee.

The process of ascertaining that the vendor of land is the owner of it is called the investigation of title; it is both laborious and expensive. The result of the investigation even in a complicated case may be reduced to the form following: '*B* can convey with the concurrence of *C*, *D*, and *E*, but *D* and *E* are entitled to ascertained parts of the purchase money.'

Although in practice the investigation of title is made on the occasion of a purchase or mortgage by the advisers of the intending purchaser or mortgagee, this is not necessary. The investigation may be made at any time and by any person, and if the result is written in a book kept in a public office, and if it is provided that no instrument, or that no instrument with certain exceptions, shall pass any estate, or perhaps pass the legal estate in the land, till its effect is entered in the book, we have registration of title.

The possession of land is constantly changing. No entry in a book can show who is in the possession of the land: this is a fact that can only be ascertained by inquiry on the land itself. According to the ordinary law a purchaser takes subject to the rights of the person in possession, whether such rights be legal or equitable, and whether he inquires what they are or neglects to make such inquiry.

It may be objected that it is not the practice of conveyancers to direct inquiries to be made as to possession. Several answers may be made to this objection.

First. In the great bulk of cases the purchaser trusts to the honour of the vendor. It may be observed that when the transaction is a sale as distinguished from a mortgage there is not a very serious risk in trusting the vendor, as, if he makes a fraudulent conveyance of land of which he is out of possession, the fraud will generally be discovered as soon as the purchaser endeavours to enter, i.e. immediately on completion, and in many cases the purchaser will be entitled to compensation under the vendor's covenant for quiet enjoyment.

Secondly. In most cases the inquiry is in effect made by the purchaser before he consults his lawyer, and that though he is hardly conscious of making it. A prudent purchaser either goes himself or sends an agent to inspect the lands before he enters into a contract for purchase or to advance money on mortgage. In the course of inspection he necessarily ascertains who is in possession and whether the person in possession is a tenant of the vendor. I can only say that I have known cases where attempts made, either by fraud or mistake (which I know not), to sell land not belonging to the vendor, and to sell in breach of trust were defeated by inquiries being made on the land.

Thirdly. In the country it is, generally speaking, a matter of notoriety who is the person to whom the tenant in possession pays his rent; in other words, who is the freeholder in possession. This is not always the case in London, and accordingly in purchases in London inquiry is often made from the tenant in possession. It should also be noticed that where, as is common in London, there is a succession of leases, it is not necessary for the purchaser of the freehold reversion to inquire whether the immediate lessee of the vendor is in possession of all the property comprised in the lease, as, if he loses possession, the Statutes of Limitations will not cause time to begin to run against the reversioner till the expiration of the lease. I may perhaps add that a careful vendor causes the land of which he is in possession or the rents of which he is in receipt to be compared with the land to which he can show title before he offers it for sale (Hunter, L. Tr. 1895, 1261).

The two rules that I have laid down may be stated in the converse manner, 'The person in possession is *prima facie* the owner, and the only use of investigating the title is to show the nature of his estate.'

The Land Transfer Act, 1875, ignores the distinction between corporeal and incorporeal property, as it provides that a registered transfer for value shall confer on the transferee an estate in fee simple subject only to certain rights, which do not comprise the rights of the person in possession as such. It appears to me that this provision of the Act is faulty; it makes a vast and very mischievous change in the law.

I doubt very much whether the provision in question will really obviate the necessity of a purchaser making inquiries from the person in possession what his rights are. For probably the Act will not protect a purchaser against equities, and possibly against legal rights created otherwise than by registered disposition (see the Act, s. 49), that he ought to have ascertained by inquiry from the person in possession.

It should also be pointed out that a person who takes a registered transfer without making inquiry from the possessor does not necessarily acquire possession; he may have to bring an action to acquire possession, and it is possible that the possessor may have a perfectly good equitable defence. The practical result is that no prudent purchaser of registered land will neglect to make inquiry from the person in possession.

If I am right in thinking that a prudent purchaser of registered land will always make inquiries from the person in possession of the land, and that such inquiries afford a great safeguard against fraud¹, the provisions of the Land Transfer Act, 1875, conferring a good title on a careless purchaser who neglects to make these inquiries, ought to be repealed; I may repeat that they offend against the canons laid down in the report above referred to.

Most landowners have no knowledge what their title is; all that they know is that they and persons through whom they claim have or have had possession: it would, I think, be considered to be a monstrous hardship for a man in possession of land to lose it merely because some person made an entry in a book behind his back, a possible result of the Land Transfer Act, 1875, while if the ordinary law as to unregistered land is retained as to registered land, this could not occur.

The owner of the first estate of freehold has the right to the custody of the title-deeds; if he is unable to produce them on a sale or mortgage the purchaser is put on his inquiry whether they have been deposited as a security, and is liable, if he neglects to make such inquiries, to be postponed to an equitable mortgage. There is however another reason for requiring them to be produced, that is, to avoid the risk of personation; if *A* be the person who ought to have the deeds and the vendor cannot produce them or account for them, it affords some presumption that the vendor is not *A*.

Although the Land Transfer Act, 1875, directs the registrar to deliver a land certificate to a registered proprietor, and provides (s. 81) that the deposit of the land certificate shall for the purpose of creating a lien on the land be deemed equivalent to the deposit of the title-deeds, there is no provision requiring the production of the land certificate on a transfer or on the creation of a charge. There is nothing inconsistent with registration in requiring the production of the land certificate on these occasions, in the same manner as, according to the custom of the Stock Exchange, before the buyer of shares pays his money he is entitled to have delivered to him not only a transfer, but also the share certificate showing

¹ Holt, L. Tr. 1878, 947, 951; Farrer, L. Tr. 1879, 1199. See also 38 Solicitors' Journal, 5.

that the person who executed the transfer was the owner of the shares.

On a sale of unregistered land the purchaser is entitled to have the execution of the conveyance attested by some person appointed by him. This is a very valuable provision against personation; there can be no reason why it should not be extended to transfers and charges under the Land Transfer Act, 1875.

Forgery of conveyances on sale is uncommon, as it would be detected as soon as the purchaser attempted to enter; forgery of mortgages is not uncommon, but I never heard of a case in which the attempted fraud would have been successful if the mortgagee had insisted on the mortgage deed being executed in the presence of a person named by him who knew the mortgagee. This is only a branch of the wider proposition that no forgery can be successful if a personal communication is made before completion to the person whose execution of an instrument is necessary. This affords a reason that I have not mentioned why the purchaser should make inquiries on the land, as the fact of his having made the inquiries, even where tenants are in possession, is likely to come to the ears of the owner, who will thus be warned that a conveyance or mortgage of his land is in contemplation.

It is very difficult to see the reason of the provisions in the Land Transfer Act, 1875, preventing any title to registered land being acquired by the operation of the Statutes of Limitation. It is a mistake to think that the acquisition of title by those statutes is incompatible with registration of title. If *A* be the registered owner of land to which *B* has acquired a title under the statute, an intending purchaser from *A* will learn on inquiry on the land that *A* is not in possession, while an intending purchaser from *B* will find that *B* is not registered. No one can be defrauded, neither purchaser will complete, and the only inconvenience that will result is one that is necessary to registration, viz. that *B*, the true owner, will be unable to complete till he has had the register rectified. There is very high authority as to the beneficial effects of these statutes (*J. S. Mill*, *Polit. Econ.* bk. 2, cap. 2, s. 2; *White v. Parnter*, *Knapp*, 227; *Dundee Harbour Trustees v. Dougall*, 1 Macq. H. L. 321; *Dalton v. Angus*, 6 App. Ca. at p. 818; *Thomson v. Eastwood*, 2 App. Ca. at p. 248), and so far as I am aware there is no authority against them; I cannot therefore help thinking that the repeal of the statutes so far as relates to registered land is improper, not only as making a wholly unnecessary distinction in the law as affecting land of different classes, but as being mischievous in itself—how mischievous cannot be seen till we discuss the questions that arise as to boundaries.

The ordinary conveyancing description of land is, generally speaking, conclusive both as to boundaries and extent. The word 'conclusive' in this place means 'conclusive as to what the vendor is expressed to convey'; it implies no statement as to his title. Let us consider an example. 'All that messuage with the several pieces or parcels known as Brosley Farm, situate in the parish of Wimbledon in the county of Surrey, containing in the whole 143 a. 2 r. 13 p. or thereabouts, all which premises are now in the occupation of John Doe and are bounded on the west by the high-road leading from Wimbledon aforesaid to Kingston, on the north by land belonging to Thomas Jones, Esq., on the east and south by land belonging to the Earl of Kew, and are more particularly described in the schedule hereto and with the abutments thereof are delineated on the map drawn on these presents, and are therein distinguished by a pink colour.' The schedule will contain a list of the closes comprised in the farm, with the name, acreage, and state of cultivation of each, and a reference by numbers to the map.

A person who wishes to ascertain what is meant by Brosley Farm can ascertain it by inquiry on the spot, as the description 'Brosley Farm in the parish of Wimbledon in the county of Surrey' is conclusive both as to boundaries and extent. It must however be remembered that 'Brosley Farm' may not mean the same thing now as it did a few years ago, or as it will a few years hence; therefore we add the rest of the description. The statement as to acreage is not intended to be conclusive; it is only inserted for the purpose of showing that the Brosley Farm that we mean is Brosley Farm which contains about that quantity of land. The statement of occupancy is of importance for two reasons: *first*, because it can always be shown within a limited time what land a person was in occupation of; and *secondly*, because in many parts of the country a farm is hardly known by its name, it is generally known by the name of the occupier. The statement of the abutments is of importance as showing that the vendor did not intend to retain a small slip of land next the property of the adjoining owners, as is common on the sale of land for building, and also helps to explain what is meant by Brosley Farm. Similar remarks apply to the list of closes and the map.

It will be remarked that there are several descriptions, all intended to show what is meant by Brosley Farm. Each of them, except the map (and possibly the occupancy), is conclusive as to what is meant. Now why is the map standing alone not conclusive? The reason is that it is quite impossible, on whatever scale the map is drawn, to delineate the land with absolute accuracy. The boundary between

two properties is not a finite space ; it is Euclid's line, 'length without breadth,' and it is impossible to denote its position with absolute accuracy on a map. But a map added to the other parts of the description conduces much to clearness.

The Land Transfer Act, 1875, provides (s. 83 (5)) that 'Registered land shall be described in such manner as the registrar thinks best calculated to secure accuracy, but such description shall not be conclusive as to the boundaries or extent of the registered land.'

It appears to me that it is impossible for the registrar, who has never seen the land, to be able to describe it with the same accuracy as the persons interested. But setting this objection aside, there is the further objection that it places the registrar in the position of a judge without appeal.

The present registrar is a man of vast experience, and yet in the 'Examples of Registration, &c.,' published by authority the description of registered land is, 'All the land shown and edged with red on the accompanying map.'

I am informed that although the registrar does not absolutely decline to allow a house in a street to be denoted by its number, he raises objections to this being done.

It is difficult to see what is the objection to employing the ordinary conveyancer's description. We have the high authority of the present registrar for saying that the employment of such a description is not incompatible with registration, for, in his 'Suggestions for Compulsory Registration' printed in the Appendix to the Report of the Committee on Land Titles, &c., 1878, at p. 188, he says 'that the parcels may be taken from the last conveyance, or described in any other manner the parties please, and with or without a map attached.' There is a general consensus of authority that a map alone, valuable as it is as a subsidiary description, is insufficient. (See Dart, *Vendors and Purchasers*, 6th ed. p. 601. Joshua Williams, L. Tr. 1878, 415: 'A map is a good servant but a bad master.' Ib. 436: 'There are more mistakes made in maps than in verbal descriptions. . . . The boundaries as they appear in maps are not the actual boundaries of the land ; if there is a hedge and ditch the boundary of the land is not the hedge ; that boundary is never put on the map by surveyors ; they survey up to the hedge ; the consequence is that the map of the country does not accurately represent the interests of the different proprietors.' Ib. 546: 'A map is a very useful thing to elucidate the description of the parcels.' See to the same effect the late Judge W. Barber, L. Tr. 1879, 888. Lord Cairns, L. Tr. 1879, 2957: 'I should be sorry to say that I thought you could have transfers merely by reference to a map however accurate, getting rid of all other kinds of descrip-

tion ; no doubt a map as ancillary to a transfer would be exceedingly valuable.' See also Wolstenholme, L. Tr. 1895, 700 et seq., 877 et seq.)

Let us however look at the question whether it is safe to convey by map alone, apart from authority. It is common for a person selling land for building to reserve a little strip of land about one yard wide, round the edge of part of the property sold, for the purpose of preventing roads from being made without the consent of the vendor. I have even heard that an action was recently brought as to the ownership of a strip of land only two inches wide. It is absolutely impossible to describe strips of land of the nature above mentioned, especially where, as often happens, the boundary of the strip is on one side irregular, by reference to a map only ; for on a map of the $\frac{1}{2500}$ scale one yard is represented by $\cdot 0144$ inches.

The provisions in the Land Transfer Act, 1875, that the registered description is not to be conclusive as to extent or boundaries, are perhaps necessary if the register is a register of owners as distinguished from a register of title ; as it would manifestly be unfair to allow a man to be registered as owner of land with definite boundaries without inquiring from his neighbours whether the boundaries were correct. This difficulty was attempted to be avoided in Lord Westbury's Act by having the boundaries surveyed, a most expensive process. If however we register title only, or, to use the phraseology of the Land Transfer Act, 1875, if we make the estate of the registered proprietor subject to the rights of the person in possession, no difficulty can occur as to boundaries. All that a register founded on this principle would say is that 'A has title to certain lands' ; it would not say that he was owner, and unless the possession went with the title it would be clear that he was not the owner. I have known a case where part of a family estate was sold off, and by mistake the parcels which had been sold were inserted in several family deeds. No one was hurt, for these conveyances could not affect the purchaser who had taken possession.

Under the existing system there is a zone of uncertainty all round the registered land. This possibly may not be a matter of great importance in the case of a large agricultural estate, but it is of the greatest importance in the case of a small slip of land bought for building purposes. If the zone of uncertainty is one yard wide and the land is 22×220 yards, i. e. an acre, the title to 576 square yards, a very material part of the land, will be doubtful. The mathematician will observe that, in the case of lands of similar shape, the zone of uncertainty varies as the square root of the area.

An example will show the extreme inconvenience of the pro-

visions in the Act as to boundaries. *A* purchases Brosley Farm, which is not registered and which is conveyed to him by the description given above, which it will be remembered contains a statement that the farm is bounded by the high-road leading from Wimbledon to Kingston; *A* sells it for building according to the common auctioneer's description as 'having an excellent frontage to the high-road.' Assuming that there are no defects in the title and that *A* is in possession he will have no difficulty in forcing the title on an unwilling purchaser.

Now suppose that Brosley Farm was conveyed to *A* by registered assurance with absolute title. If *A* sells it under the same condition as in the case just discussed it will not be possible for him to force the title on an unwilling purchaser. He has contracted to sell land having a frontage to a road, while all that he can convey is land as to which the Act says the description is not to be conclusive as to boundaries; in other words, it is impossible to say whether his land abuts on the road or not. Surely this is a monstrous hardship? Why should the vendor of registered land be in a worse position than the vendor of unregistered land?

The practical result is, that whenever a person is registered as proprietor, even with absolute title, under the Act of 1875, it will be necessary to keep all the deeds prior to registration for the purpose of showing to a purchaser what the parcels are. Sir R. Torrens says, *L. Tr.* 1878, 3148, 'This is a very grave defect, and I hold that it renders the registration useless.' Colonel Leach says, and it stands to reason he is right, 'that if you give a man an indefeasible title without specifying what it is a title to, you do nothing at all.' *Ib.* 3093: 'It was my intention to have put my land under Lord Cairns' Act until I found out that it gave no title as regards boundaries.'

I feel convinced that if the Act of 1875 is made compulsory without repealing the provisions as to boundaries, a vast amount of confusion will be occasioned and that building land will be rendered unsaleable. It must be remembered that if registration becomes general no doubts as to boundaries can be cured by lapse of time, owing to the provisions of the Act already referred to, which prevent possession for any length of time from giving title as against a registered owner (*L. Tr.* 1895, *Wolstenholme*, 572).

In connexion with the question of boundaries I may mention that there are many cases in which boundaries are slightly shifted or straightened by adjoining owners without any conveyance being executed. If the land is unregistered the person who takes the land gradually acquires title to it under the Statute of Limitations, while the person who gives it up will be unable to make

a fraudulent sale of it, as an intending purchaser will find that the vendor is not in possession; while if the land on each side of the original boundary is registered no title will ever be gained by the statute (see Wolstenholme, L. Tr. 1895, 537, 788).

I proceed to the discussion of those changes in the law made by the Land Transfer Act, 1875, which hamper ordinary dealings with land. I do not profess to have discovered them all, for, as pointed out in 39 Solicitors' Journal, 521, in order to do so it would be necessary to go through all the deeds contained in one of the larger collections of precedents with the assistance of an official of the Land Registry, and inquire whether the effect of each deed could be registered.

The Land Transfer Act, 1875, provides (s. 83 (2)) that—

‘No person shall be registered as proprietor of any undivided share in any land or charge, and a number of persons exceeding the prescribed number shall not be registered as proprietors of the same land or charge; and if the number of persons showing title exceeds such prescribed number, such of them not exceeding the prescribed number as may be agreed upon, or as the registrar may in case of difference decide, shall be registered as proprietor.’

A landowner by his will gives his property to his children in equal shares. If the land is not registered each child can deal separately with his own share. If the land is registered he will not be able to deal with his share by registered disposition; he will only be able to deal with it by an unregistered disposition, the effect of which will be that trustees will be unable to purchase it or to advance money on the security of it. Why should he be put under this disability? Surely it is possible to register a man as proprietor of an undivided share (see Wolstenholme, L. Tr. 1895, 723 et seq.). Again, if the land is not registered the children, however many they may be, can deal with the property jointly. If the land is registered, and the number of children exceeds the prescribed number, they cannot all be registered; the registrar is to decide in case of difference who is to be placed on the register, a jurisdiction of the utmost delicacy. Similar remarks apply to coparceners or heirs in gavelkind. What can be the difficulty in registering any number of persons as proprietors? It is a mere question of book-keeping (see Wolstenholme, L. Tr. 1895, 729).

When Nonconformists purchase land for the site of a chapel they usually take the conveyance in the names of a large number of trustees. It is unnecessary to discuss their reasons for doing so. Where the number of trustees exceeds the prescribed number the effect of the section will be to prevent them from purchasing registered land, as it would be a breach of trust to take the con-

veyance in the names of some of the trustees only. It may be said that in the case of new trusts a provision authorizing a conveyance to be taken in the names of some of the trustees only can be inserted. This is not the case where the conveyances, as is not uncommon, are made by reference to an enrolled deed; and even if it could be done, it would cause expense, owing to the necessity of putting some one on the register on the death of the survivor of those trustees who were placed on the register.

Some of the provisions of the Land Transfer Act, 1875, impede the ordinary dealings with land for mining or building purposes. For example, it is by no means clear that mines or minerals can be severed from the land after first registration (*Wolstenholme, L. Tr. 1895, 633*).

On the sale of land for either of these purposes it is common to grant or reserve easements, and for the vendor or purchaser to enter into covenants which are intended to be performed by the owner for the time being of the land to which they relate. I will discuss easements and covenants separately.

A right to easements may be acquired in two different manners, by prescription or by grant. Easements acquired by prescription are of a very simple nature, and generally the only question that arises is whether the easement exists, a question which can only be ascertained by inquiry from the present and former occupiers (*Hunter, L. Tr. 1895, 1076*).

Easements created by express grant for mining or building purposes are often of a very complicated nature, so that it is necessary to inspect the deed of grant in order to ascertain what are the rights intended to be granted. It appears to me, though the question may be doubtful, that there is no power to register any easements created by express grant after first registration (*Wolstenholme, L. Tr. 1895, 925 et seq.*). But under the Land Transfer Act, 1875, s. 18, registered land is subject to the easements for the time being subsisting in reference thereto. The effect appears to be that where the servient tenement is sold a purchaser has to make the same inquiries as to the existence of easements that he has to make in the case of unregistered land, and that where the dominant tenement is sold it will be necessary for the vendor, who wishes to sell his land with the enhanced value arising from the easements created by express grant after first registration, to go behind the register and to produce the deed by which they were granted.

Covenants of two different classes are entered into by the purchasers and vendors of land in building estates—negative covenants, e.g. not to allow beer to be sold on the land, and positive covenants,

e. g. to maintain a fence on the land, or to contribute towards the repair of a road. The intention is that the covenant shall be performed by the owner for the time being of the land to which it relates. In the case of unregistered land there is no difficulty as to a covenant of the first class, as an injunction can be obtained against a breach of the covenant by any person who has notice of it, and as it is the duty of every person claiming under the original covenantee to investigate the title, he is certain to have notice if the covenant is contained in one of the title-deeds or if notice of the deed containing the covenant is endorsed on one of the title-deeds. The case of a covenant of the second class is different. The burden of it does not run with the land, and the only manner in which its performance by the owner of the land for the time being can be enforced is by inserting a power of re-entry, limited as to perpetuities, on breach of covenant. Where the land is registered so that no investigation of the title is necessary a purchaser does not necessarily obtain notice of a covenant of the first class. The Land Transfer Act contains provisions (s. 84) authorizing notice of such covenants to be registered on first registration of the land or on the transfer of registered land to a purchaser. The restriction of the power of making such an entry to the case of a transfer is very inconvenient in practice and ought to be repealed.

There appears to be no manner of registering a power of re-entry, and therefore there appears to be no manner of enforcing the performance of positive covenants against the assigns of the covenantee in the case of registered land. There appears no reason against amending the Act by authorizing the entry of a power of re-entry on the register. Perhaps the better plan would be to make an alteration in the general law, by providing that any person taking land with notice of a covenant of this nature affecting it should be bound to perform it specifically, and, in the case of registered land, by authorizing the covenant to be entered on the register. It may be objected that if this were to be allowed, all the land in the kingdom would gradually become liable to covenants of this nature, which would be very inconvenient. There is some truth in the objection, but I may observe that such a covenant contained in a well-drawn lease can be enforced by means of the power of re-entry. Possibly the better plan might be to provide that after a certain time, say ninety-nine years, from the date of the covenant no steps should be taken to enforce it without the consent of the local authority.

I may perhaps add, that so far from the objections of the Act of 1875, owing to the difficulties as to enforcing covenants relating to the land, being frivolous, they prevented me, in my own case, from

registering my title to land which I wish to sell in lots for building.

A power of re-entry restricted as to perpetuities is occasionally used for purposes other than that mentioned, and there appears to be no reason why it should not be capable of being registered.

The questions that arise as to trusts present great difficulty. There is a great difference between shares, which are choses in action, and land. The register of shares is kept by the company that is liable to pay the dividends; the result is that if notice of a trust was entered on the register the company would have to investigate the equitable title. This is not necessarily the case in a register of landowners or of the title to land. Here the duty of the registrar is merely ministerial, and if notice of trusts could be entered on the register, the purchaser or mortgagee only would be affected by the notice; the duty of the registrar would be to register transfers or charges made by the registered proprietor.

If the land is subject to a trust, notice of which is not entered on the register, the question whether a purchaser takes free from or subject to the trust depends upon whether he has notice of it.

In the first half of the present century it was the practice of some conveyancers to keep the trusts off the title: this practice was finally abandoned owing to the imposition of succession duty, which rendered it necessary for a purchaser to investigate the equitable title; but even before that duty was imposed most conveyancers objected to this scheme on the ground that it was barely possible for a purchaser to avoid having notice of the trust.

It is hardly necessary to point out the great risk that there is of a sale of shares and fraudulent appropriation of the proceeds by a trustee. I suppose that there is no layman of middle age who does not know of cases of this fraud. While under the existing practice as to land fraud of this nature is extremely rare, as in most cases the trusts appear on the title.

The protection given by the Land Transfer Act, 1875, to *cestuique trusts* by caution is futile (Joshua Williams, L. Tr. 1878, 393; McDonnell, L. Tr. 1879, 2189 et seq.); an inhibition is generally speaking too stringent, and a restriction would in most cases fail where the *cestuique trusts* are infants. It is certain that a *cestuique trust* of unregistered land is much safer than the *cestuique trust* of registered land.

Probably for this reason in some of the Australian colonies it is lawful for, but not obligatory on, the registered proprietor to insert the letters S. O. (= Special Owner) on the register. When this is done no registered transfer or charge can be made without official examination of the equitable title, as from the date of last registra-

tion. I am inclined to think that we might safely adopt this plan, with the variation that a purchaser or mortgagee might examine the title for himself, taking the consequences of concurring in a breach of trust. The result would be that the purchaser would be able to confer a perfectly good title on a purchaser from him; he would, in fact, be in the position of a person who, under the existing Act, is put on the register by means of a forged transfer.

I may add that it is always necessary for a proprietor, registered even with an absolute title, to produce an abstract of the equitable title for the purpose of showing that the land is not subject to succession duty or to the estate duty imposed by the Finance Act, 1894. Some amendment of the law in this respect is absolutely necessary if registration is made compulsory.

The fact of land being registered under the existing system necessarily causes delay in completing a transfer (see *L. Tr.* 1895, *Lake*, 2570 et seq., 2608 et seq.; *Morton*, 3774 et seq.). Mr. Morton gives a table by which it appears that the shortest time during which a transfer has been completed is one month, that the average time is two months, and that in one case it was six months. It appears to me that delay might be avoided by a slight modification of the 'Registration Abstract' in use in Victoria for facilitating dealings with the land while the owner is away from the colony. It might be provided that where notice of a transfer was entered on the certificate of title, the transfer should, on being produced for registration within a limited time, have the same effect as if it had been produced at the date of the notice being entered on the certificate. No fraud could be perpetrated if the production of the certificate was (as I have already proposed) made necessary on any entry being made in the register.

There are many provisions in the Land Transfer Act, 1875, which place the registrar in the position of a judge, and sometimes without giving any appeal from his decision. If any system of compulsion is made general there will be a vast number of registrars scattered all over the country, and it is not too much to say that some of them, excellent lawyers as they may be, will be incapable of exercising the functions of a judge. Suppose, for example, that land belongs to more than the prescribed number of people as joint tenants or tenants in common, the registrar has to decide which of them are to be placed on the register. It will often happen that the decision of a question of this nature involves inquiry into the characters and position of the parties; if this be the case, no person other than a judge of experience will be fit to decide it. There is a further objection to placing a registrar in the position of a judge: he has no power to take evidence on oath.

Surely the proper course would be to make the duty of the registrar ministerial only, and to provide that if any dispute as to what ought to be entered on the register arises, either between the parties themselves or between the parties and the registrar, it ought to be referred to the Court.

Since this article was printed I have received some kind criticisms from a learned friend as to the user of the word 'conclusive' on pp. 364 and 365.

In the case of unregistered land the abstract is conclusive as to the title, and the description of the parcels in the conveyance is conclusive both as to extent and boundaries, subject in either case to the rights of the person in possession.

In the case of registered land the title of the registered owner is conclusive against all the world, subject only to the exceptions mentioned in the Act, but the description of the parcels in the registered transfer is not conclusive as to extent or boundaries, even as against the transferee. I have endeavoured to show that the fact of the title being conclusive against the person in possession will facilitate fraud, and that it will be safe to make the parcels in a registered transfer conclusive as to extent and boundaries if the title of the registered owner and every registered transfer is made subject to the rights of the person in possession: and that making this change in the law as to registered land will not throw any appreciable burden on a purchaser.

HOWARD W. ELPHINSTONE.

[Sir Howard Elphinstone's experience is so much greater than mine that my agreement can add but little weight to his reasons: but, as I have already signed a published memorial in which some of those reasons were embodied, I may be allowed to say here that they seem to me unanswerable. Possession has been the foundation of title to English land for at least seven centuries, and no serious attempt has been made to justify overturning that foundation. But registration might be properly encouraged by giving a registered possessory title the benefit of a shorter term of limitation.—ED.]

ASIATIC MIXED MARRIAGES.

THE object of this paper is to examine some of the questions raised by the marriage of a European woman in a monogamous European country, such as England, to a domiciled Asiatic living under a personal law which admits polygamy—for example, an Indian Mahometan—and especially where the Asiatic husband already has, at the time of the marriage, a wife living in his own country. The morality or expediency of such marriages will of course not be discussed. It is enough that such cases are possible and not unknown.

The personal law of an Indian does not generally restrict him to one wife, though it may be mentioned that amongst the Hindus social custom prohibits *Vaihyas*, i.e. the main bulk of the population, from being married to more than one person at a time. By the personal law, therefore, the possession of an Indian wife is no bar to his having an English wife, and vice versa. As most Indians visit this country for temporary purposes only, their domicile remains Indian (*Steel v. Lindsay*, 9 Ct. Sess. Rep., 4th Series, 160), and the capacity to marry depends on the *lex domicilii* (*Sotto mayor v. De Barros*, 1880, 3 P. D. 1, 5 P. D. 94, 47 L. J. P. 23, 49 L. J. P. 1). Viewed thus, a married Indian can validly and lawfully marry in England an Englishwoman without fear of committing bigamy. It remains to see how far this is modified by the law of England; for English Courts refuse to recognize the *lex domicilii* when it is in direct opposition to a rule of English law (*Brook v. Brook*, 9 H. L. C. 193; *Mette v. Mette*, 1859, 1 Sw. & Tr. 416, 28 L. J. P. 117).

The law of nations as received in England does not recognize a marriage celebrated according to a law, such as the personal law of Hindus and Mahometans in India, which permits polygamy. Dissolution of such a marriage will not be granted (*Hyde v. Hyde*, 1866, L. R. 1 P. & D. 130, 35 L. J. P. 57; *Ardesir Cursetjee v. Perozboye*, 10 Moo. P. C. 375); nor will its issue be entitled to succeed to English lands (*Re Bethell*, *Bethell v. Hildyard*, 1888, 38 Ch. D. 220, 57 L. J. Ch. 487). In these respects the native marriage is no marriage at all. Succession to personalty being regulated by the *lex domicilii*, the children of the Indian marriage will be allowed to participate in the division of it. See *In re Ullee*, 1885, 53 L. T. 711. There is no reason why English Courts should differ from the American Courts in upholding the validity of native marriages to

this extent. See *Early v. Godley*, 42 Minnesota, 361; *Kohogum v. Jackson Iron Co.*, 76 Michigan, 498; *Wall v. Williamson*, 8 Alabama, 48; *Boyer v. Dively*, 58 Missouri, 510; *The Kansas Indians*, 5 Wallace (U. S. Sup. Ct.), 737; all recognizing the validity of marriages amongst the Red Indians celebrated according to the customs and laws of their tribes. British Indian law guarantees to each subject the benefit of his own personal law; British Indian Courts will, therefore, respect native marriages and grant all relief incident thereto.

What is then the position of the European wife? Is the union lawful or bigamous? *In re Ullee*, 1885, 53 L. T. 711, throws some light on the question. There, the Nawab Nizam of Bengal, a married Mahometan, when on a visit to England in 1870, induced an English lady, *A*, to embrace the Mahometan faith and then to go through the ceremony of marriage with him according to Mahometan rites. Children born of the marriage were recognized by the Nawab as legitimate. In 1880, he went through the ceremony of marriage with another Englishwoman, *B*, in London, before the Lord Mayor, and thereupon *A* separated from him. Without *A*'s consent the children were sent to England for education. The Nawab, by his will, appointed English guardians to them, settled property on, and recognized them as legitimate. On his death, *A* filed a petition claiming custody of the children, on the ground that as her marriage with the Nawab was invalid, the children were illegitimate, and ought to be in the custody of their mother. The Court held that undoubtedly the marriage was no marriage at all in England, it having been celebrated according to Mahometan law, which permitted polygamy; but that the children were not necessarily illegitimate, their legitimacy being recognized according to the *lex domicilii* of the putative father; and that even if the children were illegitimate, *A* was not entitled to their custody after they had passed the age of seven, which they had. The case, however, is indecisive, for (1) *A*'s own petition relied on the invalidity of her marriage; (2) the Court grounded the invalidity on the fact that the marriage was celebrated according to a polygamous law; (3) the point was not necessary for the decision. The decision was briefly affirmed by the Court of Appeal, 54 L. T. 286, solely on the ground of the children's interest, and without discussing the validity of the marriage.

The first circumstance leaves the question to a certain extent open. Would the marriage have been declared void had *A*'s suit been for restitution of conjugal rights, for separation, or for divorce? Perhaps it would have been; still there is considerable room for doubt.

It is difficult to see what bearing the Mahometan rites had on the invalidity of the marriage. *A* was a domiciled Englishwoman, and remained so till the completion of the marriage. For it is a well-known principle of international law that one cannot divest oneself of an existing domicile merely by entertaining an intention to that effect, when one continues to reside within the country of the domicile (*Re Stern*, 1858, 3 H. & N. 594, 28 L. J. Ex. 22); nor can one acquire a new domicile by merely abandoning the old and without fixing actual residence somewhere else (*Craigie v. Lewin*, 1843, 3 Curt. Eccl. Rep. p. 447). It would follow that an unmarried woman does not change her domicile by any mere declaration of intention in contemplation of marriage. See *Turner v. Thompson*, 1888, 13 P. D. at p. 41; *Harvie v. Farnie*, 1882, 8 App. Ca. 43. Merely embracing the Mahometan faith cannot be said to have altered her domicile. It merely changed her religion; and English law does not base one's personal law on one's religion. The marriage was celebrated in London, and if registered was valid according to English law. The previously performed Mahometan rites were in no way essential to it. It was the registration, if any, and not the observance of the Mahometan rites that constituted *A* the wife of the Nawab. And English law does not sanction polygamy¹.

The invalidity of the marriage, more assumed than proved by the Court, can be supported on three grounds only; viz. (1) that the Nawab by his personal law could contract as many marriages as he chose; and therefore every marriage, wherever celebrated, was necessarily polygamous and void. This view, if adopted, must lead to very serious consequences. For even an unmarried Indian, Turk, or Mormon cannot take a lawful English wife, and if he purports to do so the children are illegitimate. A European having adopted a non-monogamous faith, and acquired an Indian domicile, is in the same predicament. What is worse, any Indian, Turk, &c., or an Indianized European can, like the tyrant for whose behoof the Arabian Nights' Tales were told, have a new wife every twenty-four hours, for he has simply to go through ceremonies after ceremonies of marriage; and as each marriage is no marriage at all, there is no bigamy. (2) That the Nawab, being already married, could not take a lawful English wife. This would be throwing overboard the decisions in *Hyde v. Hyde* and *In re Bethell*, and recognizing the first marriage as valid. One way of reconciling the cases would be

¹ The writer has not been able to find the entry of marriage at Somerset House; but this he does not consider conclusive, owing to the almost illimitable number of ways in which the Nawab might have signed his name. He has been informed by a member of the Nawab's family that the marriage is believed to have been registered.

to suppose that the contract of marriage was entered into with an unlawful intention on the part of the Nawab, but not on the part of *A*; and that *A* could therefore avoid it (*Cowan v. Melbourne*, 1867, L. R. 2 Ex. 230); but that would hardly apply, for *A* after full knowledge of facts decided to abide by the contract, and did not repudiate it for fourteen years. Another way would be to suppose that *A* was aware of the Nawab's marriage at the time she united her lot with his, and therefore there was nothing but a contract of concubinage. There is nothing in the case to lead one to make this assumption: besides, in either case, it would be presuming that the first marriage is such as an English Court considers valid and binding absolutely. (3) That the mode of celebration did not comply with the requirements of English law, of which there is no proof.

The only tenable ground is the one first mentioned; and if the view that an Anglo-Indian marriage is invalid be adopted, we must be prepared to face all the consequences. Suppose an Indian student marries in England, and then acquires a domicile here. He dies intestate and seised of large estates of freehold. Who is entitled to them? Not the children of the English marriage, for they are illegitimate, so long as *Doe d. Birtwhistle v. Vardill*, 1840, 7 Cl. & F. 571 stands as authority. Nor yet the children of any Indian wife, if he had one; *In re Bethell*, 38 Ch. D. 220. Nor his ascendants, for the marriage of ascendants was polygamous. The lands must therefore go to the Crown. Indians had better beware of investing their cash in English lands.

The criminal aspect of the case is no less interesting. Was marrying *A* an act of bigamy? According to 24 & 25 Vict. c. 100. s. 57 the offence arises when a person, being married, shall marry another person while the first husband or wife is alive. The second marriage may take place in England or Ireland, or elsewhere if the person is a British subject. The answer to the question depends on the status created by the first and second marriages, and on the meaning attached to the words 'marry' and 'marriage.' If the word 'marry' means going through a ceremony of marriage, valid according to the *lex loci celebrationis*, and 'marriage' means the ceremony of marriage,—this signification will give the same meaning to the word 'marry' throughout the section—the offence of bigamy was committed. Put if the word 'married' means having a lawful or lawfully wedded wife or husband, and the word 'marry' means going through the ceremony of marriage, then there was no bigamy (*R. v. Kay*, 1876, 16 Cox, C. C. 292), unless we regard the first marriage as a marriage according to the law of England, and overrule the decision in *Hyde v. Hyde*. It must be

remembered that the words 'shall marry' can only signify 'shall go through the ceremony of marriage'; for there can never be a second lawful marriage.

It does not seem to be necessary that the second ceremony should be such as would have created a valid relation of husband and wife, if the husband or wife of the preceding marriage had been dead (*R. v. Allen*, 1872, L. R. 1 C. C. R. 367, 12 Cox, C. C. 193, 41 L. J. (M. C.) 97). There a marriage with a deceased wife's sister, the second wife being alive, was visited with the punishment of bigamy. Of course, such a union can only produce concubinage, as in polygamous marriages.

Suppose the marriage with *A* was not bigamous. Was the Nawab's subsequent marriage with *B* so? The answer depends on whether the native marriage or the marriage with *A* be regarded as marriage or not.

A private writer will not be expected to attempt a solution of these difficulties. It is obvious that mixed marriages of this kind are for the present exposed to great legal as well as social inconvenience.

M. L. AGARWALA.

LEGAL ASPECTS OF THE BALFOUR CASE.

THE case of *R. v. Balfour* has, in its preliminary stages, given rise to interesting points of international and municipal law on Extradition, and appears likely to occasion the decision of further questions of a department of law of a peculiarly modern growth. For this reason, it is, from a purely legal point of view, satisfactory that the case has been moved into the highest criminal tribunal, and will be adjudicated upon by the Queen's Bench.

Among the important points raised in the previous stages of this case may be enumerated the question whether the Argentine law permitted the recent treaty to have retroactive effect in the Republic (and consequently whether the case of the accused fell within the provisions of the treaty); and, incidentally, whether, if the treaty were not applicable, the Argentine provisions for non-treaty extradition could apply in view of the fact that the reciprocity demanded by the Argentine Code of Criminal Procedure could hardly be held satisfied in face of the English rule that non-treaty extradition is and always has been illegal in England. The Supreme Court of the Argentine Republic has apparently decided that the Argentine Constitution does not prevent a treaty having retroactive effect; although the language of the Court on this point leaves something to be desired in the matter of clearness. It has apparently been also decided that the British Government has fulfilled the condition of reciprocity by concluding a treaty: although it is not clear why this should be insisted on if the extradition were under treaty. It is only in non-treaty extradition that the Argentine Code requires the condition of reciprocity, and the accused has been avowedly surrendered under the treaty.

The questions remaining for the decision of the Queen's Bench Division are of equal, if not greater, interest in their bearing on extradition cases generally. The Court will have to consider the effect of the Extradition Act, 1870, section 19, as regards the limitation of the charges on which an extradited person may be tried in England. The Court will also have to consider whether judicial notice is to be taken of the recently concluded treaty with the Argentine Republic, which by its seventh section confirms the language used by the nineteenth section of the Extradition Act, 1870, but is much less open to divergent constructions. Lastly, it is possible,

if the accused should happen to be convicted, that the Courts will be invited to consider the effect of the Argentine Law of Extradition which limits the penalty to be imposed by a foreign court on any accused person extradited by the Republic.

Without referring to the merits of the case, it will be interesting to consider each of these points in order. The Extradition Act, 1870, section 19, provides—

‘Where, in pursuance of any arrangement with a foreign State, any person accused or convicted of any crime which, if committed in England, would be one of the crimes described in the first schedule of this Act, is surrendered by that foreign State, such person shall not, until he has been restored or had an opportunity of returning to such foreign State, be triable or tried for any offence committed prior to the surrender in any part of Her Majesty’s dominions for any crime other than such of the said crimes as may be proved by the facts on which the surrender was granted.’

There has hitherto been no decision by the Queen’s Bench Division on the exact force of this provision. There would certainly seem to be no satisfactory method of ascertaining what are the offences for which an accused person has been extradited except the production of the order of extradition. The magistrate at Bow Street, however, refused to cause the production of this order. Whether that decision rested on the ground that the matter was not within his competence, but within that of the Court at which the trial is to take place, is not plain. The opposite contention—that the Court can try the accused for any offence once he is in custody—was the law prior to the Extradition Act. At recent cases in the Assize Courts, the judge refused to allow a trial for any offence except that on which the accused was extradited. This would seem the logical interpretation of the provision that the accused is not to be ‘triable.’ It will be satisfactory to have the decision of the Queen’s Bench Division on this very important matter.

The language of the treaty with the Argentine Republic is free from any ambiguity. It is provided by Article 7 that—‘A person surrendered can in no case be kept in prison or be brought to trial in the State to which the surrender has been made for any other crime, or on account of any other matters, than those for which the extradition shall have taken place, until he has been restored, or has had an opportunity of returning to, the State by which he has been surrendered. This stipulation does not apply to crimes committed after the extradition.’ It will be noticed that the language of the treaty is slightly different from that of the Act. The treaty declares that the accused shall not merely be exempt from being

brought to trial, but shall be exempt from imprisonment on any charges different from those on which the extradition was granted. Although the accused has not yet been, strictly speaking, brought to trial—the magisterial proceedings being merely preliminary—he may conceivably have been kept in prison, for all that appears to the contrary, on charges not the same as those on which the extradition was granted. For the magistrate at Bow Street declined to require the production of the extradition order, and declared his intention of dealing with the offences included in the warrants issued by himself, on which warrants the accused was before him.

The last point referred to is one which may not come within the purview of the Court in any case, and which cannot come within it if the accused establishes his innocence. Nevertheless, as it has not hitherto been dwelt upon in the numerous discussions on this case, it may as well be referred to. The Argentine Code of Criminal Procedure has a chapter which specially deals with extradition, both under treaty, and apart from treaty (*Código de Procedimientos Criminales: Título V. 'Del procedimientos en los casos de extradición de criminales'*). Article 646 provides that treaty extradition is to take place in the cases prescribed by each existing treaty; while non-treaty extradition is to require as conditions precedent the existence of reciprocity on the part of the demanding State, and conformity with the uniform practice of nations. The Articles which are more important at the present stage are, however, Articles 660 and 667.

Article 660 corresponds in object rather than in method to section 7 of the treaty and to section 19 of the Extradition Act, 1870. It provides that no extradited person is to be tried for an offence committed previously to the demand for extradition other than the particular offence which formed ground for the demand. To this an exception is made in the case when the offence, although committed before, was discovered after the extradition: in which case a new demand for authorization may be made to the judge who ordered the extradition. It will be noticed that the English Extradition Act in like case allows the accused to return to the State which had surrendered him. The Argentine method would, therefore, hardly be available in any case in which the British Government was concerned. The passage, however, is worth citing:—

Article 660. '*Ningun reo extraído podrá ser juzgado por un delito anterior al que motivó la solicitud de extradición.*

'*Si por causa del delito anterior al hecho de la extradición, pero descubierto con posterioridad, se pidiese autorización para procesar*

al individuo ya entregado, el pedido que deberá venir acompañado de las puestas del proceso en que constan las observaciones del individuo acusado ó declaracion firmada de no tener ninguna que hacer, será sometido al Juez de Seccion que hubiere entendido en la demanda de extradicion y su resolucion será apelable.'

The important contention, therefore, which conceivably may be raised on the Argentine law reduces itself to consideration of the effect of Article 667 of the Code of Criminal Procedure.

That Article provides that when the offence which formed the ground of the demand for extradition bears a lighter punishment in the Republic than that annexed to the offence in the foreign State which demands the extradition, the accused shall not be extradited except on the condition that the tribunals of the State demanding the extradition shall impose on the accused, if convicted, the lighter penalty. The text of the Code is as follows:—Article 667. 'Cuando el delito que motiva la solicitud de extradicion tenga una pena menor en la República, el encausado no será extraído sino á condicion de que los Tribunales del pais que lo reclama le impondrán la pena menor.' What effect, if any, has this provision on the power of an English Court which tries a prisoner extradited by the Argentine Republic? Is an English Court bound to take judicial notice of this limitation of the powers of the Argentine Tribunals and Executive? Is the defendant, if the Court will not of itself take judicial notice, entitled to rely on this provision of the Argentine law as a necessary part of the surrender and an implied condition annexed to the surrender? Would it be material to consider whether or not the Argentine Executive or the Supreme Court formally stipulated for the imposition of the minor penalty? Or should it be assumed that all action of a foreign judicial authority is necessarily to be interpreted by the law from which that authority derives its position and its title to international recognition? It will be seen that the matter is not one to be pronounced upon without consideration.

A suggestion was made in a previous discussion on this case that the immunities accorded to accused persons by the Argentine Code of Criminal Procedure extend only to cases of non-treaty extradition, and not to extradition under treaty. This contention is inconsistent with the terms of the Code. Reference to the title shows that when non-treaty extradition is intended to be regulated by Article 652, the text begins by an express restriction to non-treaty extradition ('Cuando el pedido de extradicion no se hacese autorizado por tratados'). The obvious inference is that Articles not beginning with words of specific restriction apply to treaty as well as non-treaty cases. Therefore it would seem that the privilege

of Article 667 that the Argentine penalty, if less, must be imposed by the foreign tribunal, is applicable to the present and to all future cases of accused persons extradited under the late treaty.

A comparison of the provisions of the Bankruptcy Act, 1883, with the Argentine Penal Code will show that in the possible case of the accused being convicted, the question will be of importance. The British Fraudulent Bankruptcy Act imposes a maximum penalty of twenty years' penal servitude. The Argentine Penal Code fixes a maximum of six years' imprisonment, and incapacity to engage in commerce, for frauds and other offences against property where no violence has been used (Código Penal, Articles 198-201, De Los Quebrados y otros Deudores Punibles; Articles 202-207, De Las Estafas y otras Defraudaciones).

From every point of view it is therefore satisfactory that the highest criminal Court will be called on to adjudicate in the present case.

M. J. FARRELLY.

THE LIFE OF SIR JAMES STEPHEN¹.

IF the common fashion of biographies had been followed, the life of Sir James Fitzjames Stephen might have been expanded into several bulky volumes. He was a copious writer and an active controversialist, he held high public office in various capacities, he took part in many stirring questions of the day. He might have been left 'to tell his own story,' as the phrase goes, by means of extracts from letters, journals, articles, books, official minutes and reports, strung together by threads of biographical comment. Mr. Leslie Stephen has chosen a more excellent way. He prefers to tell his story himself. He is, as we all know, a past master in the craft of biography. He understands the arts of selection, rejection, compression. He is as rigid as his brother would have been in the exclusion of matter not strictly relevant to the main object of drawing a portrait. He has an artist's eye for the due subordination of minor details. We are told as much as, but not more than, we need know, of the influences, hereditary and domestic, which helped to form Fitzjames Stephen's character. We are guided skilfully through the leading events of his career as journalist, barrister, legislator, judge, author. We follow him, not uncritically, through his speculations in jurisprudence, morals, politics, theology. The result is a singularly life-like portrait of a very remarkable and interesting personality. The general impression left is that of a rugged promontory, whose cliff face shows the successive strata of which it is built up—Clapham, Bentham, Carlyle, India—partly resting unconformably on each other, partly fused together by the fire of a strong individuality.

Fitzjames Stephen owed more to the influences of race and home than to those of school or college. He sprang of a vigorous and prolific Aberdeenshire stock, which has supplied successive generations of eminent lawyers to England and to Australia. The first James Stephen who came south to seek his fortunes had a chequered career, in the course of which he found occasion to denounce the system of imprisonment for debt from the King's Bench prison. His son, the second English James, was helped by an uncle who had settled and prospered in the West Indies. The West Indian connexion interested him in the subject of slavery,

¹ The Life of Sir James Fitzjames Stephen, Bart., K.C.S.I., a Judge of the High Court of Justice. By his brother, Leslie Stephen. London: Smith, Elder & Co., 1895. 8vo. x and 504 pp.

and brought him into close relations with the Anti-Slavery party, including Wilberforce and other leaders of the Evangelical school. He became a member of Parliament and Master in Chancery. The third James, father of Fitzjames and his biographer, was Sir James Stephen of the Colonial Office, a great administrator, an accomplished writer, a man who combined deep religious feeling with genuine intellectual interests, and whose teaching and example profoundly influenced his son. His marriage with Miss Venn not only brought into the family the bluest blood of the Evangelical party, but, in the opinion of his sons, tempered the irritable and nervous strain of the Stephens with a marked infusion of the sturdy common sense of the Venns.

Fitzjames Stephen went in due course to Eton. But he was anything but a typical Etonian. Public schools are said to be useful in rubbing off angles. Stephen's angles were not of the kind that rub off. He cared little for the ordinary amusements of boys. After an interval of King's College he went to Cambridge, where he found himself more at home than at Eton. He is best remembered there as an 'Apostle' and as Sir William Harcourt's formidable rival in the Union debates. He could not easily adapt himself to the narrow groove of the University course. His intellectual outfit was lacking in the qualities of accuracy and finish which are essential to a scholar in the Cambridge sense. Hence he was distanced in the race for classes, fellowships, and other ordinary academical successes.

Having convinced himself by a series of syllogisms that his proper vocation was the law, he entered himself at the Inner Temple, and began a double career as barrister and journalist. He soon became the strongest journalist of his day. He was a mainstay of the *Saturday Review* in its prime. He *was* the *Pall Mall Gazette* in its days of vigorous youth. In rapidity of execution, in force and independence of style, he was unrivalled. Literary success of this kind would in most cases have been incompatible with a professional career. It would have been so in Stephen's case but for his exceptional powers of work, his indomitable energy, and, above all, his genuine devotion to his profession.

This devotion was the more remarkable because nature had failed to endow him with some of the qualities required to place a man in the first rank either as a lawyer or as an advocate. He was too impatient of technicalities, he underrated the importance of accuracy in minute details, he did not appreciate subtle distinctions. He was not, like his gifted colleague Bowen, a legal archangel who danced with ease on the point of a needle. Bowen, in his forensic and judicial arguments, elaborated, perhaps unduly,

with the finest of camel-hair pencils. Stephen, in laying on his colours, preferred a mop. One of the first arts of an advocate is the power to conciliate. But conciliation was not Stephen's strong point. As in his speculative writings he treated persuasion as a variety of coercion, so in practice his favourite argument was a knock-down blow. In arguing with a judge he would be tempted to emphasize rather than slur over points of difference. It was as difficult for him to pose as a thirteenth jurymen as to look at politics from the point of view of a Dundee elector. Nor did he condescend to some of the minor social arts by which professional advancement is obtained or assisted. He shouldered his burly figure independently through the crowd, but progressed less rapidly than more pliable and accommodating competitors. Briefs came, but not in such number or with such regularity as his ability and industry entitled him to expect.

Under these circumstances a man is tempted to deflect to a byroad where he can walk more easily and swiftly than on the public highway. Such a byroad opened itself to Fitzjames Stephen by the offer of the legal membership of the Governor-General's Council in India. He devoted to this post two years and a half of strenuous, brilliant, productive work, perhaps the most important years of his life. Of his legislative labours in India something has been said in previous pages of this REVIEW, and more need not be added here. When half his time of office was expired he returned to journalism, literature, and the Bar. He stood for Parliament, but did not take kindly to the arts of candidature. He tried, as an outsider, to induce Parliament to codify criminal law for England as it had been codified for India, and, although he failed in his immediate object, he produced Digests of criminal law and procedure which are of permanent value, and serve many of the purposes of a Code. He wrote a book in which, with startling courage and sincerity, he disburthened his soul of its deepest convictions on the moral, political, and theological problems of the day, and waged open war on sundry current conventionalities¹. The interest of this remarkable book is mainly autobiographical. There were sides of human nature with which Stephen was in imperfect sympathy, or wholly out of sympathy, and which he was therefore tempted to underrate or ignore. He saw things in black and white. What Renan would have called a *nuance* was for him a form of fog. His attitude towards religion and theology was, as his biographer has hinted, not so widely different from that of

¹ In the article to which previous reference has been made the composition of 'Liberty, Equality and Fraternity' was, through inadvertence, attributed to the Indian instead of to the post-Indian period.

many of his contemporaries as the ordinary man might be led to suppose. Only Stephen wrestled in public with the difficulties which others shirk or suppress.

He resumed his practice at the Bar, and his return to the professional high-road was eventually rewarded by a judgeship. Stephen valued his judicial position, not merely on account of the dignity and immunity from financial cares which it brought with it, but because he thoroughly enjoyed his judicial work. He had always been specially attracted to criminal law, as the branch most closely connected with morals, and he felt himself thoroughly at home when sitting as the representative of the State to testify its moral reprobation of crime. But, beyond all this, he valued his position because it enabled him to speak and write with authority on the great subject of law. No man ever realized more fully than Fitzjames Stephen the duty which a man owes to his profession, or felt more strongly that the performance of this duty is not exhausted by the diligent performance of professional duties or the attainment of professional success. He was not only a lawyer but a law reformer. From the beginning of his career he strove consistently to improve English law, to simplify its form, to remove its defects of substance, to make it more worthy of its great traditions, better adapted for its great future. And he succeeded in doing work not unlike what Maine had in his own generation done for Roman law, and what Blackstone had, in a previous century, and with the lights of that century, done for English law. He has made English law interesting to the student and intelligible to the layman. If the English or foreign student desires to obtain a general view of the present position of English criminal law it is to Stephen's books that he will turn. And it was Stephen's *History of English Criminal Law*, the great literary work of his judicial period, that first showed how the history of English law might be written. He has laid down broadly the lines on which the literary and scientific treatment of English law ought to proceed, and has sketched the ground plan of a building which it remains for successive generations of lawyers and jurists to complete; and for this reason, if for no other, his name will always hold a foremost place in the annals of English law.

C. P. ILBERT.

[I have pointed out in the *National Review* for August that Stephen's endeavours for codification, though in a literal sense they failed, were by no means fruitless. The Bills of Exchange Act, the Partnership Act, and the Sale of Goods Act, are distinctly attributable to his example.—ED.]

CONSTITUTIONAL REVISION¹.

WE welcome with pleasure a good translation into English of M. Borgeaud's admirable treatise on the amendment or, to use a convenient foreign expression, the 'revision' of constitutions.

The book should command the attention of every Englishman, and this for two reasons.

The treatise, in the first place, deals with a subject which will before many years excite the keen interest of English public men.

Ought the authority of the House of Lords to be strengthened or diminished? Ought the House of Commons to have the power of enacting fundamental changes in the constitution against the will of the Peers, and without an appeal to the country? Is it or is it not desirable that alterations in the fundamental law of the State should receive the direct sanction of the people? Is it expedient that laws changing the fundamental institutions of the State should be carried as easily, as far as procedure goes, as a law making wagering contracts illegal? Is there not something reasonable in the demand that the constitution of England should be at least as well protected from attacks dictated, it may be, by the exigencies of a party which has lost the support of the nation as is the constitution of New York? These questions and others of the same kind are, as the expression goes, 'in the air.' They are all forms of the one inquiry, What are the principles which ought to govern the revision of our constitution? To any man in search of a rational reply to this most difficult political problem M. Borgeaud's book is invaluable. It tells what are the different forms of procedure by which the constitutions of different countries are revised, and it also explains, or at any rate puts the reader in the way of understanding, what are the different political theories on which different schemes of revision are based. M. Borgeaud's treatise is at once a book of information and a book of thought; it provides in its three hundred and odd pages a greater amount of information about the amendment of constitutions than could easily be collected by an industrious student from the reading of a hundred books, or could be collected at all by any man who had not at his command a library filled with standard works on the constitutional laws of every civilized

¹ Adoption and Amendment of Constitutions in Europe and America. By Charles Borgeaud. Translated by C. D. Hazen. With an Introduction by John M. Vincent. London: Macmillan & Co. 1895. 8vo. xxi and 353 pp. (8s. 6d. net.)

country. No one who has not devoted himself to the comparative study of constitutional law can tell how great is the gain of having presented to one clearly and in a few pages an authoritative statement of the different modes of revision prevailing, for example, in the United States of America, in France, in Italy, in the different States of Germany, in Switzerland, and in each of the leading countries of the world. To know how the constitution of a given State is amended is almost equivalent to knowing who is the person or who are the body of persons in whom, under the laws of that State, sovereignty is vested; the knowledge, further, of the system of revision prevalent in a given country goes a great way towards understanding what is the way in which the citizens of that country regard their constitution. The plain truth is that a thinker who explains how constitutions are amended inevitably touches upon one of the central points of constitutional law. And M. Borgeaud's book is, as already stated, a work of thought; it is produced by a man as much accustomed to thinking as to research; for M. Borgeaud, though by nationality we believe a Swiss, belongs by education, by training, and by sympathy, to the new and energetic group of French constitutionalists who have gathered round or been produced by the *École libre des Sciences Politiques*. No school of Frenchmen has ever more fully appreciated English modes of thought. It may be said of them without exaggeration that they have created something like a new conception of political science, and have succeeded to a rare degree in combining French lucidity with English common sense and German industry. M. Borgeaud, as becomes a follower of such men as Boutmy and Sorel and Glasson, writes with the utmost clearness and with a complete avoidance of rhetorical embellishments. He keeps his eye firmly fixed upon actual facts, and in his tone of moderation and fairness resembles the best kind of English writers. He certainly would have been welcomed as a pupil by such men as John Mill or Bagehot; he is, in short, exactly the writer from whom Englishmen can, and most willingly will, gain political instruction. His book ought to be as much read—we cannot give it higher praise—as Boutmy's *Studies in Constitutional Law*.

M. Borgeaud's treatise, in the second place, affords most instructive reading for English constitutionalists because it exhibits with extraordinary clearness the essential difference between the English and the French—perhaps we may say the continental—mode of reasoning on matters of constitutional law.

This statement is perfectly consistent with the assertion that M. Borgeaud is very 'English' (if the expression may be allowed) in the manner in which he treats his subject. The truth is that it

is just because M. Borgeaud, in common with other writers of the school to which he belongs, bears striking marks of affinity to English constitutionalists that he also impresses intelligent readers with the extent of the difference between French and English methods of political reasoning. His book reads often like the work of an Englishman. One is therefore the more surprised when one suddenly comes across ways of thinking which are emphatically not English, which, be it noted, is a quite different thing from saying that they are unreasonable or cannot be defended. There is, it is true, no little difficulty in defining exactly wherein this difference between the French and the English way of reasoning consists; it would seem to lie in the fact that on constitutional matters French jurists still attach an importance to general and, as an Englishman would probably say, *a priori* or logical considerations which tell for very little with modern English constitutionalists.

The nature of this difference is best understood from an example. In the course of our author's treatise he discusses an admittedly abstruse point of French constitutional law, namely, what is the effect of Art. 8 of the Law of Feb. 25, 1875? As much of the article as need here be cited runs as follows:

'The Chambers shall have the right, in separate resolutions adopted in each by a majority vote, either of their own accord, or at the request of the President of the Republic, to declare that the constitution ought to be revised.

After each of the two Chambers shall have passed this resolution, they shall meet together as a National Assembly, for the purpose of proceeding with the work of revision.'

The problem raised by this loosely drawn article is this: has the National Assembly, when convened as one body under this article, a limited or an unlimited authority to change the constitution? Is it, in other words, a subordinate legislative body of which the authority is limited by the terms of the resolution convening it, or is it a sovereign body with unlimited authority to change all the institutions of the country? The bearing of this question, which has already divided French statesmen and French jurists, may be seen from an historical example. The two Chambers were some years ago convened as a National Assembly or Congress, for the purpose of repealing the article of the constitution under which the Chambers were bound to meet at Versailles. If the resolution convening the Assembly stated, as we think it did, that the Assembly was convened to revise this article, was the Assembly, when it met, constitutionally prohibited from altering any other constitutional provision, or did it, by the very fact of its meeting, become a sovereign body to revise the whole constitution? This general question has divided

French opinion. Gambetta on a critical occasion maintained one view, Clémenceau another; one eminent professor teaches that the authority of the National Assembly is derived from, and limited by, the resolutions convening it; another eminent professor maintains that the two Chambers, when united as a National Assembly, are a sovereign body of unlimited authority; M. Borgeaud arrives at a third conclusion, different from that reached by the statesmen or teachers whose opinions he cites. M. Borgeaud holds in effect (if we have rightly understood his meaning) that the National Assembly is, even when the two Chambers sit together, not a sovereign body, and is therefore bound constitutionally to keep within the terms of the resolutions under which it is convened, and further that, as neither the Chambers when sitting separately nor the Chambers when sitting together as a National Assembly constitute a sovereign power, it follows that sovereignty resides in the body of French citizens, and that every change in the constitution needs in theory for its constitutional validity ratification by the vote of the French people. M. Borgeaud, in short, holds that though the constitution is admittedly silent about any necessity of submitting changes in the constitution to a popular vote, yet that on any sound constitutional theory, and in conformity with what he terms 'a fundamental tradition of French public law interrupted only by peculiar political circumstances,' every change in the constitution ought to be confirmed by a vote of the people, or, to put the matter shortly, that the referendum is impliedly a portion of French constitutional law.

No Englishman need be ashamed of refusing to form an opinion on the meaning of an article in the French constitution which perplexes French lawyers and French statesmen, and it would be the height of rashness to assert that M. Borgeaud's construction of the article is wrong. What an Englishman may reasonably pronounce some opinion upon is the method by which M. Borgeaud's conclusion is reached. Our author is conducted to it mainly by his reliance on three principles, namely, that France must have a written constitution clearly differentiated from ordinary laws: that the constitution can only proceed from a constituent power which is superior to all constituted authorities: and that constituent power resides in the people. His confidence in these principles is strengthened by his trust in the so-called 'fundamental tradition of French public law,' and by his acquiescence in the dictum of an eminent jurist, that 'it is inconceivable that constituted authorities may limit the right of the constituent power.' Now if these dogmas be admitted it would be easy enough to put our author's conclusion in the form of a logical argument, and the conclusion

itself, viz. that it is well that constitutional changes should be ratified by a popular vote, may, we are most ready to concede, be politically sound. But an English critic cannot in honesty avoid making two criticisms on M. Borgeaud's whole train of argument. The principles, in the first place, on which he relies are only roundabout ways of expressing his belief in the dogma that constitutional changes require for their moral validity the sanction of a direct popular vote, and this doctrine seems to an Englishman to be by no means self-evidently true. The whole line of argument, in the second place, on which he relies would carry no weight whatever with any English lawyer or statesman called upon to interpret the terms of a constitution.

Let us suppose that an English judge were called upon to say what was the meaning to be affixed to Art. 8. We can tell pretty well how he would proceed. He would consider in the first place the actual words of the article; finding them ambiguous he would then look to 'precedents,' which constitute the nearest equivalent recognized by an English lawyer to what M. Borgeaud calls a 'fundamental tradition.' It is just possible that if precedents were wanting or were absolutely undecisive, our judge might be driven to consider how far one interpretation of the article was politically more expedient than the other, but he would take this step with the greatest reluctance, and certainly would pay no heed whatever to considerations grounded on the nature of sovereignty and the like. Now the one thing certain is that such a mode of interpreting Art. 8 as an English judge, or we may add an English statesman, could adopt, would be fatal to M. Borgeaud's conclusion. Article 8 says nothing whatever about the necessity for an appeal to the people, and by creating an assembly for the express purpose of introducing constitutional changes excludes, as an Englishman would think, the possibility of arguing that such an appeal is a part of French constitutional law. Nor can M. Borgeaud's 'fundamental tradition' be of any avail to support his conclusion. The 'tradition' does not in reality exist. The Constitution of 1791, the Constitutions of the Restoration, the Constitution of 1832, the Republican Constitution of 1848, each and all of them refuse recognition to the doctrine that constitutional changes ought to be submitted to a popular vote. The same remark holds good of the Constitutional Laws on which the existing French Republic rests. Not one of them has been submitted to the vote of the citizens. Add to all this that since 1875 the constitution has been modified by the National Assembly without any appeal to the nation, nor has any statesman seriously contended that such an appeal is necessary. M. Borgeaud would probably reply that his

argument is not meant for lawyers, but for statesmen. Our answer is that the essential difference between English and French constitutionalists is that English constitutionalists do and that French constitutionalists (at any rate as it appears to an English critic) do not argue questions of constitutional law in the spirit of lawyers. If M. Borgeaud contends that in point of policy there is much to be said in favour of a referendum, we fully agree with him. But here again our author has not argued his case after the manner of an English constitutionalist. He has tried to show that a referendum, or something very like it, is impliedly part of the French constitution, and is in harmony with the fundamental tradition of French public law. He has not tried to establish the expediency of introducing the referendum into France. That he has not done this must be to English readers a subject of regret. The value of M. Borgeaud's work would, valuable as his book is, have been doubled by a statement, coming from so vigorous a writer and so clear a thinker as M. Borgeaud, of the grounds on which it is, in France at any rate, expedient that no constitutional change should take place until it has been sanctioned by the voice of the nation.

A. V. DICEY.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

The Mirror of Justices: edited for the Selden Society, by WILLIAM JOSEPH WHITTAKER, with an Introduction by FREDERIC WILLIAM MAITLAND. London: Quaritch. 1895. 4to. lv and 200 (double) pp. (text and translation opposite being identically paged) + 201-210 pp. (index).

IF this extraordinary book were now discovered for the first time it would probably not be thought worth printing at large: for it certainly cannot be trusted to add anything to our knowledge of English laws and customs as they were in fact either before or after the Conquest, and its fictions are so eccentric that for the most part they cannot be used even as an index to tendencies of opinion or common topics of grievance existing in the author's time. We have here neither a professional exposition nor a political manifesto, but the fantastic diversions of an individual. However, it so happens that the 'uncritical voracity' of Coke (to borrow from Mr. Maitland a phrase we cannot better) gave the 'Mirror of Justices' a pseudo-classical reputation among the medieval literature of the Common Law. It has been printed, translated from the printed text, such as it was, and reprinted in both original and translation, and has been quoted with more or less seriousness almost down to our own time. Even Sir Francis Palgrave, though in his 'English Commonwealth' he rightly spoke of the 'Mirror' as 'a very curious specimen of the apocrypha of the law,' retained a hankering for it when he was dealing in semi-historical fiction, and in 'The Merchant and the Friar' he made Andrew Horn talk of having transcribed Alfred's wise judgments from an ancient book of dooms, and prophesy that a sceptical and unthankful posterity might hereafter doubt their authenticity. The prophecy is not literally correct, for clear disbelief is not doubt. If any negative can be certain in history, it is certain that King Alfred did not hang a judge named Bulmer for inventing the offence of larceny by a bailee, or a judge named Bermond for passing a capital sentence in England upon an outlawry in Ireland. Such a book, having once gotten a reputation in an uncritical age, cannot be merely passed over by a more critical one, and the present work of the Selden Society is therefore not superfluous.

We have already heard Mr. Maitland's introduction reproved on the ground of levity. No one will agree in such a reproof who has read any considerable part of the book, and has a little knowledge of medieval English law and history and ever so little sense of humour. It is quite impossible to take this production seriously. The puzzling question is whether the writer took it seriously himself. If he did, how had he been deceived? If not, whom did he expect to deceive? Or, if he did not expect to be believed, what was his motive for so tedious and barren an exercise of invention? Mr. Maitland has made some ingenious suggestions, but has not professed to arrive at any definite conclusion. He thinks it

possible that the book may be a remainder of Andrew Horn's youthful days, a kind of juridical wild oats. We confess we do not think it possible that any Englishman, clerk or layman, bred to sober English business, can even in his 'Wanderjahre' have written the hopelessly unpractical nonsense of which the 'Mirror' is full. All that we know of Horn shows him as a man of business and a man of sense. The only known medieval MS. of the 'Mirror' belonged to him, but we do not know that he valued it otherwise than as a curiosity. He could not have written the 'Mirror' at any time after he had read the collection of 'Leges Anglorum,' recently commented on by Dr. Liebermann, which was also in his possession. We do not even know for certain that he so much as read the 'Mirror' at all. Busy men in the reigns of the Edwards must have sometimes acquired books which they had no time to read, as they often do in the reign of our present Sovereign Lady. Notwithstanding Dr. Verrall's brilliant and amusing conjectures communicated to Mr. Maitland, we do not believe in any particular connexion between the verse containing the name of Horn and the other verses prefixed to the MS. These verses are themselves perhaps not the work of one hand, for the first two hexameters are quite fair medieval verse, and might well stand alone, while the elegiac couplet that follows is halting and probably corrupt. As they stand these two lines will neither scan nor (with all respect for Dr. Verrall) construe.

Let us see what qualities we can safely affirm or deny concerning the author of the 'Mirror.' First, he was not a practising English lawyer. Not to speak of his countless blunders and shameless falsifications in stating quite familiar law, no practitioner in the King's courts could have habitually described crimes and trespasses by no other name than sins, or have opened with an exordium which practically denies the existence of any common law distinct from the law of nature, gives only a grudging assent to the validity of local custom, and rejects the authority of 'examples nient canonizes,' meaning thereby, to all seeming, the decisions of the King's judges. By the way, we believe the sense of the corrupt passage at the foot of p. 5 to be of this kind: 'Because there is no other law than this [the writer's so-called common law 'warranted by Holy Writ' and given to all mankind] it is used [reading 'use' for 'une'] from old time in general councils or parliaments, and is allowed to be varied [taking 'use' to be a clerical error for some word to this effect] by sound [taking 'seins' = *canones* not *sanctos*] customs, and that differently from place to place,' &c. This is not the sixteenth-century doctrine that statutes contrary to common reason are void, for our author's reason is not the reason of English Common Law, but the reason of a law of nature not recognized by any other English author, of which, apparently, the best evidence is in the canon law. Further, this writer professes to believe that every man has 'ordinary jurisdiction' over his neighbour by the law of nature unless he is disqualified by sin, and that this power is restrained only by secular law (p. 121). As regards the Common Law, he is a fantastic amateur. He had access to Bracton, and, it would seem, to a book of common forms, and he had read and attempted to criticize the principal statutes down to 1285. The use he made of his materials was such, at best, as an untrained amateur might be expected to make of technical books. His statutory mare's nests, in particular, are quite of the same kind that amateurs often find at this day.

Being then no common lawyer, was this author a canonist? Not a learned one, at all events. He does not write like a scholar: once or twice he alludes vaguely to continental usage, but he shows no real knowledge of canonical jurisprudence. His talk of 'ordinary jurisdiction,' 'mortal sins,'

'consistories' and the like, bespeaks an unintelligent haunting of ecclesiastical courts, but nothing more. The wild natural justice that runs through his extensions of, e. g. larceny and perjury, by a kind of constructive criminal equity, and his glaring self-contradictions within a few pages, as when he says first that the King can be sued (p. 6) but only in Parliament (p. 7), and then (p. 11) that it is the duty of the King's court to issue remedial writs against him at need, appear to negative exact professional training of any kind or degree.

Was he a clerk of some sort? The ecclesiastical twist points that way, and he has some little command of scriptural instances. He was no parish priest however, nor had he any love for the secular clergy; for he grumbles at *Circumspecte agatis* (p. 199) for throwing charges on parishioners which ought to be met by the parson out of the tithes. This would be quite consistent with his being a regular, or attached in some way to a religious house. He magnifies the jurisdiction of local and seignorial courts. Can he have been a steward or clerk of the courts of some monastery? We must think of him, at any rate, as in a place and station where it was possible to dabble a good deal in books and see very little of the world. We may think of him, if we take his preface seriously, as in some condition which gave him the opportunity of getting into trouble with secular justice, possibly by obstinate persistence in usurping jurisdiction. But this touches the unsettled questions that hang likewise about the book called *Fleta*. The comment on the first article of *Circumspecte agatis* (p. 198-9) seems against the present conjecture, but our author is nothing if not self-contradictory, and his particular fads about details were apparently dearer to him than any general principles.

Was he anything of an antiquary? Not much. If he had read the *Leges Henrici Primi* and *Leges Edwardi* with moderate acumen, not to speak of earlier genuine documents or the Latin version thereof, his inventions would have been more plausible. The fact that the 'Mirror' wholly failed to become current in the Middle Ages is conclusive to show that the author over-estimated the credulity of his age. The proportion of educated readers who would swallow merely nonsensical fiction about the Anglo-Saxon period may have been greater towards the end of the thirteenth century than it is towards the end of the nineteenth, but it was probably less than in the sixteenth or eighteenth.

Finally, was our mysterious author a would-be impostor, or was he himself imposed upon? Where the fact is so odd as to make all hypotheses improbable, we may be allowed to suggest one improbability more. A foreign clerk, say from some part of the King's continental dominions (peradventure from Gascony, for there is something of a Gascon air about his manner of romancing), a rather feather-headed young man with a little learning and an overweening conceit of it, has settled in England and takes up the study of English institutions in a blundering amateur fashion. He listens eagerly to tales of grievances, takes his law from everybody except lawyers, and thinks he is philosopher enough to put the lawyers to rights. He goes to work merrily, and (after he has well fixed his ideas) thinks he would like some good ancient examples, and consults a learned friend—shall we say the brother who posts up the chronicle of the monastery, and is believed capable of reading an Anglo-Saxon charter, nay, of writing one at a pinch for the good of the house? Brother Peter or William, perceiving that no authentic matter at his command will satisfy the young clerk's 'uncritical voracity,' and being one that loves a joke, and moreover finding it cheaper to invent than to explain, proceeds to fool him to the top of his

bent. And so the King Leuthfred, *temporis incerti*, who made excellent statutes, and that reverend judge Iselgrim (surely not the same Iselgrim who was hanged by an unjust judge called Vivelin?), and Nolling who was indicted for sacrificing to Mahomet, are all gravely set down. But the jest misses fire for three centuries, and its concealed author leaves this world chuckling softly to himself, half pleased and half disappointed that English lay folk are not so gullible after all.

The practical moral is that we should like a good Old-French scholar to see whether any provincialisms can be detected in the language of the 'Mirror,' so far as the peculiarities of the archetype may have been preserved by the MS. which appears to be the source of all our known copies, and whether any local clue may be given by the fictitious names.

F. P.

The Taking of Evidence on Commission, including therein Special Examinations, Letters of Request, Mandamus, and Examinations before an Examiner of the Court. By W. E. HUME-WILLIAMS and A. ROMER MACKLIN. London: Stevens & Sons, Lim. 1895. 8vo. xv and 317 pp. (12s. 6d.)

THIS book contains within it the materials for a useful work on the special but not unimportant subject with which it deals, but the present edition is disfigured by some careless inaccuracies on minor points, and by the vain repetition in the same phraseology of the facts proved and points decided in various reported cases (e.g. *Nadin v. Bassett*, pp. 25, 41 and *passim*).

On p. 2 the authors go out of their way to inform us that 1 Will. IV. c. 22 was passed in 1827, though in the Appendix the Act is correctly dated 1831, and on p. 53 the words 'eminent Queen's Counsel' are clearly meant to apply to Mr. A. B. Kempe, who has not that we are aware of taken silk.

The very interesting correspondence, by the way, in the Times and elsewhere during the last three months of 1883, and the despatch of Count Hatzfeldt, the German Foreign Minister, as to Mr. Kempe's temporary imprisonment in Germany on the charge of 'exercising public functions without proper authority,' would, we think, have been worth referring to in a work which purports to give the historical growth of its subject-matter.

However, evidences of haste in a first edition should not blind us to the real merits of the book, which are considerable. The whole of the practice, which must be observed in obtaining an order for taking evidence on a commission or otherwise out of Court, is given with care and minuteness in a way useful to the practitioner, and the work cannot fail to be serviceable to those who have to take part in the actual proceedings before a commissioner or special examiner.

The book contains some useful forms, and an excellent index.

S. H. L.

Notes and Commentaries on the Sale of Goods Act, 1893, with special reference to the Law of Scotland. By RICHARD BROWN. Edinburgh: W. Green & Sons. 1895. 8vo. xxxvii and 399 pp.

By the Sale of Goods Act, 1893, important and, in some respects, revolutionary changes have been introduced into the Scots law of sale, in the direction of assimilating the law of Scotland to that of England and other

English-speaking countries. In an introductory note, Mr. Brown informs us that he was associated to some extent with the learned draftsman in an endeavour to adapt the measure to Scottish requirements, and, in this book he furnishes a useful and industrious exposition of the extent and effect of the alterations made by the statute. To each section of the Act are appended explanatory notes and cross-references, as well as a commentary summarizing the earlier law and pointing out the bearing of the statutory provisions. The commentaries, though occasionally somewhat diffuse, are lucidly and sensibly written. The footnotes contain copious references to English authorities, and there is an admirable index. We doubt not that the book will be frequently in the hands of all who have much to do with commercial cases in Scotland.

A blot on the work is the not infrequent introduction of matter, which, though interesting in itself, is foreign to the subject in hand and, accordingly, out of place in a treatise of this sort. Thus, at p. 261, a statement in the commentary that, in England, the ascertainment of questions of fact by means of a jury is much more general than in Scotland, is made the occasion of a lengthy note, setting forth the history of jury trials in Scotland from the earliest times. Again, in Appendix III, a note, extending to seven pages, contains a statement of facts, which, in Mr. Brown's judgment, 'clears away the mists so long surrounding the history and authorship of the Statute of Frauds.' To clear away the mists from an English statute is, doubtless, a laudable achievement; but we suspect that the Scots practitioner who takes up Mr. Brown's book for guidance in a difficulty is not likely to care how heavily the mists hang round the Statute of Frauds, if only he can get some rays of light shed on an obscure point in the Sale of Goods Act, 1893.

Banking Law (with forms). By WILLIAM WALLACE and ALLAN M'NEIL.
Edinburgh: W. Green & Sons. 1894. 8vo. 433 pp.

THE aim of this volume, as stated in the preface, is to provide bankers with practical assistance in the legal questions which arise in the course of everyday banking business, and to supply students with a manual to prepare for the law examination of the Institute of Bankers. The work is also expected to be of use as a book of reference for the legal profession. As a manual for bankers and students, the book appears at first sight rather bulky; but on close examination, it is difficult to say that any considerable portion of the information conveyed may not be required at any moment in practical business.

The opening chapter on 'Banker and Customer' (pp. 1-30) contains an excellent summary of the everyday duties belonging to this useful relation. The next two chapters, 'Entering into and Extinction of Obligations' and 'Special Customers' (including married women, &c.), complete the first part (pp. 1-80) of the volume. Part II (pp. 81-179) deals with Bills of Exchange, Cheques, and Promissory Notes: Part III (pp. 180-253), with Securities for Advances: Part IV (pp. 254-325), with Insolvency and Sequestration (i.e. Bankruptcy), including a chapter on the winding up of companies. Part V (pp. 327-338) contains a short account of 'Diligence' (the Scottish expression for taking property in execution). Lastly (pp. 339, 340), there is a note on a Bank's Responsibility (under the Act of 1890), in respect of its name appearing on a prospectus—a subject on which it appears dangerous to speculate until determined by judicial authority. A collection of forms—

probably not the least useful part of the book—is added as an Appendix (pp. 341–411). The Index (pp. 413–436) appears concise and sufficient.

The point of view is that of Scots law. For instance (at p. 126)—‘bill operates as an intimated assignation.’ It is always a surprise to find that this rule works without practical inconvenience; but such appears to be the case. On the other hand, in contrast with English law, a world of trouble is saved. For, according to Scots law (p. 189), ‘there is no process by which the furniture in a man’s house, or the stock in his warehouse, can be effectually assigned by him in security so long as he remains in possession thereof’; and the rule is unattended by any practical inconvenience. This suggests an obvious way of cutting the knot so curiously entangled by the English Bills of Sale Acts.

The Conveyancing Acts, 1881, 1882, and 1892; The Vendor and Purchaser Act, 1874; The Land Charges Registration and Searches Act, 1888; The Trustee Act, 1893; The Married Women’s Property Acts, 1882 and 1893; and The Settled Land Acts, 1882 to 1890; with Notes and Rules of Court. By EDWARD PARKER WOLSTENHOLME, WILFRED BRINTON, and BENJAMIN LENNARD CHERRY. Seventh Edition. London: William Clowes & Sons, Lim. 1895. Sm. 8vo. xxxii and 499 pp.

THE Conveyancing Act, 1881, and the Settled Land Act, 1882, are models of lucid and accurate drafting. They were drawn and passed into law under most favourable circumstances; after the original drafts had been settled in consultation by the late Sir Francis Reilly (*clarum et venerabile nomen*) and Mr. Wolstenholme, they were widely circulated among real property lawyers. The comments of the profession were sought for, and such comments as were made received very careful attention, and lastly the Bills were not amended in any matter of importance during their passage through Parliament. The result is that these Acts have been very successful, they have materially shortened conveyances, and have diminished the risks arising from assurances being settled by incompetent practitioners. What a contrast they present to the Married Women’s Property Act, 1882, an Act which is hardly intelligible!

The present volume contains the Conveyancing and Settled Land Acts, the Land Charges Registration and Searches Act, 1888, the Trustee Act, 1893, and the Married Women’s Property Acts, 1882 and 1893, with careful notes intended for the use of conveyancers. We say ‘intended for the use of conveyancers,’ as the discussion of the Trustee Act does not extend to Court practice.

The draftsman of an Act is rarely capable of commenting on it with success, owing to the temptation that he is under of taking the Act to bear the meaning that he intended to express, not the meaning really expressed in the Act. Mr. Wolstenholme has escaped this temptation, and has discussed the Conveyancing and Settled Land Acts as impartially as if he had not been concerned in drafting them.

The present is the seventh edition of this book. We have had all the prior editions in use; each has surpassed its predecessors, and without flattery we may honestly say that the present edition is excellent. Mr. Wolstenholme has been fortunate in obtaining the assistance of two such capable lawyers as Mr. Brinton and Mr. Cherry.

Rogers on Elections. Vol. II. *Parliamentary Elections and Petitions.* Seventeenth Edition. By S. H. DAY. London: Stevens & Sons, Lim. 8vo. xxviii and 746 pp. (21s.)

THE fact that this is the seventeenth edition of this volume of 'Rogers' is of itself sufficient evidence of the value of the work. The book deals not only with the practice of parliamentary elections, but also with that on petitions—the latter forming a rather grim subject to many successful candidates.

We have not heard of many impending petitions against members returned at the recent general election, but there is no doubt that the coming petition has been as the skeleton at the feast at more than one triumphant political gathering.

To all who are in any difficulty and who wish either to attack or defend a parliamentary seat, this book can be highly recommended. Most of it is undoubtedly dry, but it has amusing aspects, and if the curious reader wishes to step outside the limits of elementary education and to see examples of the possibilities of human error, he may turn with advantage to the facsimiles of marked ballot papers given at pp. 130-135.

We have also received:—

Jahrbuch der internationalen Vereinigung für vergleichende Rechtswissenschaft und Volkswirtschaftslehre zu Berlin. 1. Jahrgang. 1. Abtheilung. Berlin, 1895. 335 pp.—As our readers know, an English Society of Comparative Legislation has just come into existence and promises to do much good work. It is modelled to some extent on the example of the French society of the same name. The above annual is that of a German society, which has just been created in a similar way. The volume is divided into five parts. The first is devoted to special papers, the second to legislation, the third to law literature, the fourth to cases, and the fifth to the business of the society. The divisions, however, rather indicate what is wanted than what has actually been done. As it is, the volume is practically a collection of essays on questions of law. The subjects dealt with show a quite desirable variety. Professor Meili, of Zürich, very appropriately conducts the reader over Switzerland as a home of international conventions. Village Responsibility for the Criminal Acts of its Members in Old and New Servian Law (Mil. R. Wesnitsch), Louis Blanc and Socialism in France (Otto Warshauer), Exterritoriality of Foreigners in Turkey (Antonopoulos and F. Meyer), the State and the Rights of Man (Pasquale Fiore), Science and Philosophy of Law (W. Schuppe), and a general survey of the work proposed by the society (Bernhöft) form the *pièces de résistance* of the volume. The second division deals with Notaries in Greece and Foreigners in Canada and in Venezuela (Pappafava), and the work of the Croat-Slavonic Parliament in 1894 (Jovanovic). There is evidently work for many societies in comparative law.

Advocacy and Examination of Witnesses . . . in India. By H. N. MORISON. Calcutta: Thacker, Spink & Co. 1895. 8vo. viii and 212 pp.—Except for a not very considerable amount of matter specially appropriate to Indian practice, this book does not, in our opinion, contain anything of such importance or so well expressed as to give it much chance of competing with Mr. Richard Harris's well-known 'Hints on Advocacy,' a book of which the author does not seem to have heard. We have only to add that

Mr. Morison, though a member of the English Bar, has so far forgotten his scholarship as to spell Quintilian with two Ts.

The History of the Theory of Sovereignty. By F. E. M. BULLOWA. New York. 1895. 8vo. 81 pp.—This little thesis is good and promising so far as it goes, but the treatment is too brief to warrant any definite judgment on the author's powers of original work. We can only say that we hope more may be heard of him.

The Indian Penal Code, with Commentary. By W. R. HAMILTON. Calcutta: Thacker, Spink & Co. 1895. 8vo. lxii and 664 pp.—Only Indian practitioners can judge whether a new edition of the Penal Code was wanted. This one appears to be full and workmanlike, and is furnished with a good historical preface.

The Law relating to Building Societies. By E. A. WURTZBURG. Third Edition. London: Stevens & Sons, Lim. 1895. 8vo. xix and 487 pp. (15s.)—Review will follow.

A Digest of the Law relating to District Councils. By G. F. CHAMBERS. Ninth Edition. London: Stevens & Sons, Lim. 1895. 8vo. xxvi and 283 pp. (10s.)

A New Guide for Articled Clerks. By H. W. STIFF. London: Sweet & Maxwell, Lim. 1895. 8vo. x and 239 pp. (6s.)

Company Precedents for use in relation to Companies. By F. B. PALMER, assisted by C. MACNAGHTEN and A. J. CHITTY. Sixth Edition. Part I. London: Stevens & Sons, Lim. 1895. 8vo. lxxvi and 1143 pp. (36s.)

A Treatise on International Law. By W. E. HALL. Fourth Edition. Oxford: Clarendon Press; London: H. Frowde and Stevens & Sons, Lim. 1895. 8vo. xxvii and 791 pp. (22s. 6d.)

Ruling Cases. Edited by R. CAMPBELL. Vol. IV. Bankruptcy—Bill of Lading. London: Stevens & Sons, Lim.; Boston, Mass.: The Boston Book Co. 1895. La. 8vo. xxx and 862 pp. (25s.)

The Revised Reports. Edited by Sir FREDERICK POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. Vol. XX. 1818-1819 (1 Bligh; 1 J. & W.; 4 Madd.; 2 B. & Ald.; 8 Taunt.; 6 Price; 2 Starkie). London: Sweet & Maxwell, Lim.; Boston, Mass.: Little, Brown & Co. 1895. La. 8vo. xv and 777 pp. (25s.)

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